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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-78

WARREN A. McFADDEN,

Petitioner,

v.

G. H. McSHANE CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT and APPENDICES

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. _____

WARREN A. McFADDEN,
Petitioner

v.

G. H. McSHANE CO., INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner, Warren A. McFadden, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 26, 1977.

OPINIONS BELOW AND IN COMPANION CASE

The following opinions in the case at bar (Civil action No. 74-1046) are set forth in Appendix I A hereto:

1. Opinion of the District Court, Gourley, J., dismissing petitioner's counterclaim, January 31, 1975, not reported (1a).

2. Opinion of the District Court, Snyder, J., for judgment on the merits in favor of petitioner, March 15, 1976, reported in 414 F.Supp. 720 and in 124 Pittsburgh Legal Journal 150 (4a).

3. Opinion of the District Court, Snyder, J., denying petitioner's motion to vacate the dismissal of his counterclaim, May 19, 1976, reported in 414 F.Supp. 730 and in 124 Pittsburgh Legal Journal 191 (34a).

4. Opinion of the Court of Appeals affirming the denial of petitioner's motion to vacate the dismissal of his counterclaim, April 26, 1977 (No. 76-1954), not yet reported (54a).

The following opinions in a companion case (Civil action No. 74-1090) are set forth in Appendix I B hereto:

1. Opinion of the District Court, Gourley, J., dismissing the action, December 7, 1974, not reported (65a).

2. Opinion of the Court of Appeals reversing the dismissal of the action, July 14, 1975 (No. 75-1092), not reported but noted in 519 F.2d 1398 (68a).

3. Opinion of the three-judge District Court, February 2, 1976, not reported (74a).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was dated and entered on April 26, 1977, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the counterclaiming defendant may recover damages from the plaintiff who has subjected defendant's property to prejudgment seizure, without notice, opportunity for prompt hearing or even ex parte judicial approval, pursuant to a writ entitled "writ of foreign attachment," long after similar prejudgment seizure had been held unconstitutional when the writ was entitled "writ of replevin."

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Pennsylvania Rules of Civil Procedure governing writs of foreign attachment, rules 1251-1279 (Pa. R.C.P. 1251-1271, 42 Pa. C.S.A.[1]). Those applicable to the present controversy, rules 1252(1), 1255, 1257, 1258, 1260(c), 1262 and 1272(a), (b), (c), and (g), are set forth in an appendix hereto (80a).

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1 Purdon's Pennsylvania Consolidated Statutes Annotated, Title 42, Rules of Civil Procedure, not to be confused with Purdon's Pennsylvania Statutes Annotated, Title 42, Justices of the Peace.

Amendment XIV to the Constitution of the United States, section 1 (1 U.S.C. p. xlix), set forth in an appendix hereto (84a).

STATEMENT OF THE CASE[2]

Respondent, plaintiff below, sued petitioner, defendant below, in a Pennsylvania state court to collect a real estate broker's commission of $150,000, beginning the action by attaching petitioner's rents from an office building in Pittsburgh pursuant to a writ of foreign attachment issued on praecipe filed in the office of the Prothonotary by respondent's counsel without notice, hearing or even ex parte judicial approval. The Pennsylvania foreign attachment procedure made (and still makes) no provision for prompt hearing, and it permitted the defendant to secure the dissolution of the attachment and the return of his property only by posting a surety bond in double the amount of plaintiff's claim (or cash in the amount of plaintiff's claim, including probable interest and costs), conditioned for the payment of such judgment as plaintiff might recover, including interest and costs. Petitioner was unable to obtain such a surety bond or cash.

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2 The facts, undisputed, are recited in Judge Snyder's opinion in the District Court, appendix I A 3, pp. 34a-37a.

Petitioner removed the case to the federal district court on the ground of diversity of citizenship (28 U.S.C. § 1332), entered a general appearance subjecting himself to jurisdiction in personam, and demanded that respondent release the attachments. On respondent's refusal, petitioner filed suit in the district court[3] to enjoin the continuance of the attachments, on the ground that they deprived him of his property without due process of law, and moved for a three-judge statutory court to pass on the constitutional question thus raised. He also filed an answer on the merits to respondent's complaint for the broker's commission, and he filed a counterclaim for the unlawful attachment of his rents, alleging that the deprivation of his rents might result in his inability to make the payments on his mortgage necessary to prevent foreclosure and the ultimate loss of his investment. This later occurred (58a, fn. 8), causing a $2,000,000 loss to petitioner.

The District Court (Judge Gourley) dismissed the second action (seeking an injunction) (67a), and

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3 The statement in the opinion of the court below that this suit was instituted in the state court (57a) was in error.

the counterclaim in the first (1a), holding in both that the Pennsylvania foreign attachment procedure was not unconstitutional. On petitioner's appeal from the dismissal of the injunction action, the Court of Appeals vacated the order and remanded the cause for hearing before a three-judge court (72a). The three-judge court, after hearing argument on a stipulated record, filed an opinion (74a) and entered an order (77a) enjoining the continued attachment of petitioner's rents, on the ground that the Pennsylvania foreign attachment procedure was unconstitutional under the fourteenth amendment.

Shortly thereafter, Judge Snyder, before whom the action for broker's commission had been tried non-jury (by stipulation after original demand for trial by jury), handed down an opinion (4a) and entered a judgment (32a) in favor of petitioner on the merits. Petitioner then moved to vacate Judge Gourley's earlier order (which was not appealable) dismissing the counterclaim. When Judge Snyder denied the motion to vacate (53a), petitioner appealed. After affirmance by the Third Circuit (64a), petitioner filed the instant petition for certiorari.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS CONTRARY TO THE PRIOR DECISIONS OF FOUR THREE-JUDGE COURTS, ONE OF WHICH WAS AFFIRMED BY THE SUPREME COURT OF THE UNITED STATES.

The Pennsylvania foreign attachment procedure contained all the constitutionally objectionable features which had caused the Pennsylvania replevin procedure to be held unconstitutional in Fuentes v. Shevin, 407 U.S. 67, on June 12, 1972, and none of the saving features which had caused the Louisiana sequestration procedure to be upheld in Mitchell v. W.T. Grant Co., 416 U.S. 600, on May 13, 1974. Indeed, the Pennsylvania foreign attachment rules lacked even the two replevin requirements beneficial to defendants: an affidavit and a bond from the plaintiff. The modifications of Fuentes made by Mitchell are immaterial to the present controversy, because the Pennsylvania foreign attachment rules did not comply with even the Mitchell requirements.

The Fuentes decision (as modified by Mitchell) outlawed all prejudgment seizure without prior notice (or prior ex parte judicial approval as in Mitchell) and

hearing (or opportunity for prompt post-seizure hearing, as in Mitchell), as Circuit Judge Campbell stated in Higley Hill, Inc. v. Knight, 360 F.Supp. 203, 205 (D.Mass. 1973):

> "After Fuentes, the bar, the legislature and the courts were on notice that the long-established Massachusetts pre-judgment attachment rules were, at very least, suspect. They knew, or should have known, that attachments made without notice and hearing opportunity were governed by principles spelled out in Fuentes. Accordingly, state plaintiffs generally can have little compliant if such later attachments are invalidated."

The Massachusetts statute discussed by Judge Campbell was of the type commonly available in all the New England states to acquire jurisdiction over defendants, resident as well as non-resident, at the commencement of any action, whether in contract, tort or equity. After the Fuentes decision such statutes were speedily held unconstitutional by three-judge courts in Massachusetts,[4] Maine,[5] New Hamp-

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4 Schneider v. Margossian, 349 F.Supp. 741, Sept. 22, 1972.

5 Gunter v. Merchants Warren National Bank, 360 F.Supp. 1085, June 25, 1973.

shire[6] and Rhode Island.[7] None of those cases involved writs of replevin. The decision of the three-judge District Court in Rhode Island, rendered exactly three weeks after that of the Supreme Court in the Fuentes case, was summarily affirmed by the Supreme Court even before briefs were filed, under the name of Georges v. McClellan, 409 U.S. 1120, on January 15, 1973.

The court below, without mentioning the Supreme Court's decision in Georges McClellan or answering any of petitioner's other arguments made above, relied on their own decision in Kacher v. Pittsburgh Nat. Bank, 545 F.2d 842 (3d Cir. 1976), refusing to allow the plaintiff to recover damages from the defendant, which had replevied his property before the Fuentes decision had been handed down. Kacher's claim relied on Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), which involved a prejudgment attachment of wages in the amount of $63.18. The basis of Mr. Justice Douglas' opinion invalidating

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6 Trapper Brown Construction Co., Inc. v. Electromech, Inc., 358 F.Supp. 105, May 14, 1973.

7 McClellan v. Commercial Credit Corp., 350 F.Supp. 1013, July 3, 1972.

the attachment there was that wages were "a specialized type of property presenting distinct problems in our economic system." (p. 340). Thus the Sniadach case did not clearly foreshadow the subsequent invalidity of prejudgment attachment of property other than wages, whereas Fuentes gave unmistakable notice of the invalidity of all prejudgment attachments regardless of the type of property involved and regardless of the name of the writ used to make the seizure. The immateriality of the nature of the property was made clear in Mr. Justice Stewart's opinion (407 U.S. at pp. 89-90).[8]

The court below mentions (58a-59a) two cases decided subsequent to Fuentes, Lebowitz v. Forbes Leasing and Finance Corporation[9] and Balter v. Bato Company, Inc.[10] The court was in error in stating

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8 Although perhaps not crucial, another difference between Kacher and McFadden is that Kacher did owe money to Pittsburgh National Bank, whereas McFadden owed none to McShane Co. Kacher was deprived of his property for a short time; McFadden, forever.

9 456 F.2d 979 (3d Cir. 1972), cert. den. 409 U.S. 893.

10 385 F.Supp. 420 (W.D. Pa. 1974).

(57a) that the Lebowitz case was decided subsequent to Fuentes v. Shevin. The Lebowitz opinion was handed down on February 24, 1972, more than three months prior to Fuentes. While the Balter decision was subsequent, it was clearly wrong and would have been reversed if an appeal had been taken. Counsel for Bato had failed to call Judge Rosenberg's attention to the Supreme Court's decision in Georges v. McClellan, supra [11] (p. 11).

II. THE DECISION BELOW DENIES TO A SUCCESSFUL LITIGANT THE FRUITS OF HIS VICTORY, CONTRARY TO THE PREVAILING RULE IN THE SUPREME COURT OF THE UNITED STATES.

When a court departs from stare decisis and adopts a new principle of law, overruling existing precedents, the new principle is often made applicable prospectively only, except as to the parties in the case before the court. The successful party in the case changing the law is never denied the fruits of his victory, regardless of the resulting hardship on the loser, who relied on prior, until then viable,

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11 As shown by a copy of the brief for Bato furnished to the undersigned by Bato's counsel, Sanford M. Lampl, Esquire.

decisions: Simpson v. Union Oil Co., 396 U.S. 13 (1969); Stovall v. Denno, 388 U.S. 293, 301 (1967).

The court below denied petitioner the fruits of his victory over respondent in setting aside the attachment on February 2, 1976, on the ground that to permit recovery would result in retroactive application of their decision less than a week earlier in Jonnet v. Dollar Sav. Bank of City of New York, 530 F.2d 1123, January 27, 1976, affirming a decision of the District Court for the Western District of Pennsylvania (392 F.Supp. 1385) which had dismissed for want of jurisdiction over defendant's person an action begun by writ of foreign attachment, on the ground that the Pennsylvania foreign attachment procedure was unconstitutional under the Fuentes case.

If the decision which changed the law relating to the validity of prejudgment attachments by writ of foreign attachment was not Fuentes but Jonnet, then petitioner should not be denied the benefit of the change in the law merely because the three-judge court which heard his case waited for the Court of Appeals' decision in the Jonnet case. Argument in petitioner's case was heard by the three-judge court

on October 21, 1975. Argument in the Jonnet case was heard by the Court of Appeals seven weeks later, on December 9, 1975.

The purpose of the rule that decisions overruling prior law should be applied prospectively only, except in the overruling decision itself, is to prevent outside late comers from jumping on the bandwagon and receiving a free ride after they see that they will be sure to win without exertion or risk of time and money. This purpose is inapplicable to a litigant who expends his time and money attempting to change the law, but whose case happens to be decided after that of another litigant simultaneously engaged in the same effort. It would be most unfair to award the fruits of victory to one and deny them to the other merely on the basis of which case happened to be decided first. This is especially pertinent in the case at bar, where McFadden took the first successful appeal (69a). His efforts may well have contributed to the court's decision in the Jonnet case.

The decisive factor in determining whether a decision should have only prospective application should be the date when the other suits were filed. All suits which were pending on the date of the decision changing the law should be given the benefit

of the change. Suits previously filed which have been completely concluded and closed, and suits thereafter filed seeking recovery based upon events which occurred before the change should not be given retroactive benefit from the change. This appears to be the general rule followed by the Supreme Court of the United States (subject to exceptions in certain situations): Linkletter v. Walker, 381 U.S. 618, 622 (1965).

The rule advocated above has, at least until the decision of which review is now sought, also been the rule in the Third Circuit, as exemplified by United States ex rel. Tyrrell v. Speaker, 471 F.2d 1197 (3d Cir. 1973), and Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972). When the Gray case, changing the law, was decided, the Tyrrell case was pending. The court then gave Tyrrell the benefit of the new rule announced in Gray, and remanded Tyrrell's cause to permit him to seek damages.

The decision in Tyrrell is to be contrasted with that in United States ex rel. Jones v. Rundle, 358 F. Supp. 939 (E.D. Pa. 1973). Jones, also deprived of his constitutional rights, brought suit after the Gray decision had been rendered. In denying recovery to Jones, Judge Body said (p. 952):

> "We conclude that to the extent that Gray makes new law in this circuit it should not be made retroactive with regard to monetary damages, and we so hold."

In the case at bar the two suits involving petitioner were filed in October and November, 1974, prior to even the decision of the District Court in the Jonnet case, handed down on April 7, 1975. Petitioner should be denied no right available to the Dollar Savings Bank of New York. Petitioner should be denied no right granted to a convicted criminal.

The question involved in the case at bar is also present in another case pending in the Western District of Pennsylvania, Reliance Electric Company v. McFadden, Civil Action No. 75-598. This question, insofar as it relates to a claim for damages, has never been passed upon by the Supreme Court. In view of the unsettled state of the law governing the subject of retroactive application of decisions changing the law, it would be most beneficial to litigants and to the public to have the question authoritatively decided. This will eliminate the need for filing future suits which ultimately turn out to be futile or unnecessary. The Court should complete the revision of the law governing prejudgment attachments begun with the Sniadach and Fuentes decisions, and not

leave an important facet of it hanging in doubt. The importance to the public of the issue here involved would appear to be at least on a level with that which the court accepted for review in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

CONCLUSION

If the decision which changed the law covering the validity of prejudgment attachments was Fuentes v. Shevin, petitioner is entitled to recover from respondent, who made use of such unlawful process long after the Fuentes decision had been handed down.

If the decision which changed the law was Jonnet v. Dollar Sav. Bank of City of New York, petitioner is entitled to recover because his claim was pending at the time the Jonnet decision was handed down. The decision of the court below causes the right of recovery to turn upon which of two (or more) pending cases happens to be decided before the other. This is unjust to the winning litigant in the delayed case, because although he wins, his victory is empty. He does not recover his damages. The result is the same as if he had lost. This should not be the law of the land.

The petition for certiorari should be granted on either of the above grounds.

Respectfully submitted,

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June 30, 1977.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

G. H. McSHANE COMPANY, INC.,	)	
v.	)	Civil Action No. 74-1046
WARREN A. McFADDEN	)	

MEMORANDUM ORDER

In this proceeding the Court, after hearing held December 30, 1974, entered an Order dismissing defendant's counterclaim. Although counsel for the plaintiff attended said hearing, counsel for defendant advised the Court that notice of the scheduling of said hearing was never received. Subsequent thereto, the Court granted defendant's motion to vacate the dismissal of the counterclaim and to permit the filing of a brief in opposition to plaintiff's motion to dismiss defendant's counterclaim.

The Court has considered the briefs of counsel and must conclude that there is no basis to permit the counterclaim to stand. Essentially, the defendant's

theory in filing said counterclaim is that the foreign attachment issued by the plaintiff violated the provisions of the Constitution of the United States and, moreover, is invalid under statutory law as well as the rules of the Superior Court of Pennsylvania. The Court has previously considered defendant's contentions in the companion case of McFadden v. McShane, Civil Action No. 74-1090, in which a motion to dismiss said proceeding was granted.

Very simply stated, the challenge to Pennsylvania's foreign attachment procedure is, as a matter of law, without merit. In a very well reasoned Opinion, the Honorable Louis Rosenberg has upheld this procedure as satisfying federal constitutional requirements. See Balter v. The Bato Company, Ltd., Civil Action No. 74-206 (W.D. Pa., Sept. 6, 1974). Moreover, the United States Court of Appeals for the Third Circuit has specifically upheld the Pennsylvania foreign attachment procedure. Lebowitz v. Forbes Leasing and Finance Corp., 456 F.2d 976 (3d Cir. 1972).

In view of the foregoing, it is the considered judgment of the Court that plaintiff's motion to dismiss defendant's counterclaim should be granted.

AND NOW, this 31st day of January, 1975, the motion of plaintiff to dismiss defendant's counterclaim is hereby granted.

s/ Wallace S. Gourley, SDJ
Senior District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

G. H. McSHANE CO., INC., Plaintiff	:	
vs.	:	Civil Action 74-1046
WARREN A. McFADDEN, Defendant	:	

OPINION

SNYDER, J.

This is a diversity action tried to the Court in which the Plaintiff Real Estate Agency seeks a commission from Warren A. McFadden for the efforts it expended in connection with McFadden's acquisition of two properties in the Pittsburgh area. Judgment will be entered in favor of the Defendant.

I. HISTORY.

The Methodist Church Union (MCU) is a nonprofit Pennsylvania corporation which carries out charitable activities in the Pittsburgh area under the auspices of the Methodist Church. In 1969, MCU

decided to raze one of its church buildings, located at the corner of Smithfield Street and Seventh Avenue in the City of Pittsburgh, and to erect in its place a large office building in the hope that proceeds from such an operation would support further philanthropic activities.

G. H. McShane, the President and principal stockholder in G. H. McShane Company, Inc., a Pennsylvania corporation engaged in the real estate brokerage business, voluntarily sought out the D. D. Davis Construction Company of Youngstown, Ohio (Davis) and MCU thereafter engaged Davis to construct the building, secure the necessary financing, and look after the leasing of the building. Davis was successful in arranging for a construction loan through Mellon Bank, N.A., and in making arrangements with Prudential Insurance Company for a mortgage to take over the permanent financing if the building was completed by September 30, 1971.

MCU repeatedly encountered financial problems during the course of construction, so that it was unable to meet its commitments to the contractor as they fell due. There also developed a serious construction problem requiring extensive reworking

of some of the structural steel when it was found that the building was sixteen inches shorter than called for in the plans. Thus by the summer of 1971, it became apparent that Davis would not be able to complete construction within the time limitations set forth in the Prudential Take-Out Agreement. It was also apparent that a sufficient number of tenants had not been secured to provide adequate rent to meet the carrying charges of the building.

MCU recognized the danger that Prudential might not be bound by its commitment, and that MCU's investment in the property would be jeopardized if foreclosure of the construction mortgage occurred. MCU thus began to exert considerable efforts to sell Smithfield Plaza at a price which would allow it to recoup its equity in the property; such efforts, however, proved unsuccessful.

At this point, Dr. Allan J. Howes, Executive Director of MCU, proposed combining Smithfield Plaza with an undeveloped tract of approximately 360 acres (Epworth Woods) located some distance from the City of Pittsburgh, which was capable of conversion into a housing development. He envisioned the production of sufficient cash from Epworth Woods to

sustain Smithfield Plaza until it would become self-financing. This idea was communicated to many real estate people, including G. H. McShane.

In September of 1971, G. H. McShane telephoned Warren A. McFadden, a real estate investor and developer in Fort Lauderdale, Florida with whom McShane had become acquainted in an earlier real estate transaction. He told McFadden about the Smithfield Plaza and Epworth Woods properties in some detail and explained the financial problems MCU had encountered in attempting to complete the development of Smithfield Plaza. McShane further informed McFadden that under the circumstances, MCU would probably accept substantially less than they already had invested in Smithfield Plaza but that as a result, MCU should not be expected to pay any real estate commission. In addition, McShane told McFadden of the various offers made for Smithfield Plaza, including one by the United Steel Workers of America to purchase for six million dollars. (There was also pending an offer for Epworth Woods for one million dollars.) McShane at this point told McFadden that a real estate commission of $282,000 would normally be payable on these two sales, but if McFadden were to acquire the properties, McShane

would be willing to bring about the transaction for a $150,000 commission. McFadden agreed that this was a reasonable amount in view of the selling price of the properties (which at the time were not producing any monies) but suggested that payment of the commission should be deferred until such time as either property yielded "sufficient revenue", to insure that such payment would not be a deterrent to the proposed transaction.

On October 4, 1971, McFadden and McShane had another discussion and McFadden decided to come to Pittsburgh to personally inspect the properties. McFadden arrived on October 5, 1971 and toured both properties in company with Dr. Howes, G. H. McShane and his brother, Hugh McShane, who was also employed by the McShane Agency. Later at dinner, McFadden outlined a rough proposal for the acquisition of both properties under a long term lease with options to purchase at various times during the term of the lease. In response to Dr. Howes' stated concern that MCU could not afford to pay any commission on the transaction, McFadden assured him that he (McFadden) and McShane "had an arrangement". At that time, McFadden also stated to Hugh McShane that he (McFadden) would be the one

who would be paying the real estate commission.

MCU's Executive Committee on October 19, 1971, received McFadden's proposal to take a ninety-nine year lease on Smithfield Plaza and to pay MCU rentals, to be determined after deducting expenses from rents received. The proposal also included the purchase of Epworth Woods for one million dollars, which sum would be applied to the upkeep and maintenance of Smithfield Plaza until it became self-sustaining; and options to purchase Smithfield Plaza. When the Executive Committee expressed interest, McFadden presented a formal written proposal embodying the above terms on October 21, 1971, and following its presentation, when McFadden was not in the room, Dr. Howes informed the Committee that the proposal did not provide for payment of a real estate commission by MCU, as none was to be payable by them.

Between October and December of 1971, McFadden frequently visited Pittsburgh and Hugh McShane continued to perform many services for him. G. H. McShane, who at this time was living in Sarasota, Florida, also made many trips to Pittsburgh in connection with this transaction. On December 28,

1971, Prudential bought out the Mellon construction loan and McFadden took over Smithfield Plaza under the lease. On August 25, 1972, McFadden acquired title to Epworth Woods for the purchase price of one million dollars, payable on or before December 31, 1972. At this same time, MCU transferred the Smithfield Plaza land to McFadden's nominee, Con-Dev Dairy Corporation, for no additional consideration under an option to purchase for two and a half million dollars during the first twenty-five years of the ninety-nine year lease.

Not long afterward, on November 4, 1972, McFadden obtained a loan of $2,300,000.00 from Great American Mortgage Investors (GAMI) for the development of Epworth Woods. Of that loan, $1,000,000.00 was used to pay the purchase price of Epworth Woods; $594,300.00 was used to replenish McFadden's line of credit at the Chase Manhattan Bank in New York City; $118,000.00 went for a small piece of land and dwelling adjacent to Epworth Woods (the Dessecker property); $109,371.72 was placed in a bank account entitled, "Warren A. McFadden, Escrow Account Epworth Woods"; and the remaining $478,328.28 was used to pay interest on the GAMI loan, or was not accounted for. Interest on the GAMI

loan was paid through April of 1974, and the unpaid interest thereon from May 1, 1974 through November 30, 1975 (the Hearing date) amounted to $543,087.08.

Con-Dev received formal title to Smithfield Plaza, land and building, on April 19, 1973, and on May 8 and 9, 1974, McFadden transferred title to Epworth Woods to Schriber Deed Security, Incorporated, as there was an option agreement between McFadden and a third party to purchase approximately one-third of Epworth Woods. These transfers were made without the knowledge of G. H. McShane, and when he became aware of them, he called McFadden to request payment of his commission. McFadden denied there was any agreement regarding a real estate commission, refused to discuss the matter, and directed McShane to his lawyer. Shortly thereafter this action was brought.

It is noted that Epworth Woods at the time of Hearing had produced no income, except for about $3,000 rental from the Dessecker Property. Smithfield Plaza sustained a net deficit in expenses over income through August 31, 1975 of $3,590,816.25, so that on September 8, 1975, Prudential foreclosed on its mortgage on Smithfield Plaza and purchased the premises.

II. DISCUSSION.

There is little dispute that McShane brought together a willing buyer and a willing seller, and that no commission was to be paid by MCU. Nor is it controverted that G. H. McShane Co., Inc. through G. H. McShane and Hugh McShane, was the moving force in finding a buyer who had previously known nothing about the properties and who purchased them under terms and conditions which were satisfactory to MCU. But McFadden denies the existence of an enforceable contract.

During his first trip to Pittsburgh on October 5, 1971, McFadden assured Dr. Howes that MCU would not be responsible for payment of any commission by making it clear that there was an "arrangement" for the commission with McShane. This was reiterated by his statement to Hugh McShane that he (McFadden) "would pay Mickey's (G. H. McShane) commission". On December 20, 1971, G. H. McShane presented McFadden with a letter which set forth the terms of the commission agreement as follows:

"December 20, 1971

Mr. Warren McFadden
512 Intra Coastal Drive
Ft. Lauderdale, Fla. 33304

Dear Warren:

Jim Sweeny has advised me that it would be to each of our best interests to have a short memo of our agreement relating to my commission on the sale of the Methodist Church Union building in downtown Pittsburgh and the related conveyance of the Church Union's North Hills property.

As I recall, our understanding was that the total McShane Agency's commission on both of these transactions was to be $150,000.00, should you or your nominee eventually acquire ownership of the downtown building (but not necessarily the land beneath it) and the North Hills property. In order that this project will not be burdened with front-end expenses which it can scarce afford, I have also agreed that this amount need not be paid unless and until sufficient revenues are available to you out of the development in North Hills or building operation downtown to pay the fees. I do not believe that we have reached an exact agreement as to what amount of revenues should be considered 'sufficient', but I am happy to leave this to your reasonable judgment. I would hope that sometime we might be able to set an outside limit on the time within which that commission would be payable.

If the above, accurately reflects our understanding, please sign and return the enclosed copy of this letter.

Yours very truly,

/s/
G. H. McShane

Accepted:

_____

Date:

"

The testimony varies considerably from this point. McShane says he handed the letter to McFadden in an envelope which McFadden put into his coat pocket and never returned. McFadden recalls receiving and reading the document, but says he immediately returned it to McShane, telling him there was no commission agreement and that McShane "must be crazy".

There is no dispute that G. H. McShane continued to render service by meeting with McFadden in Pittsburgh on numerous occasions, with McFadden's architect, and with engineers and planners to secure additional tenants for Smithfield Plaza. This conduct

is consistent with McShane's, and not McFadden's, testimony as to what happened to the letter, and we therefore give credence to the explanation given by G. H. McShane.

Hugh McShane testified that for approximately two years, beginning October 5, 1971, he spent an average to two to three days a week on McFadden's behalf, long after McFadden's alleged rejection of any commission agreement. McFadden admitted having dinner with Hugh McShane and his wife after the letter incident, and he did not deny acknowledging at that time that he owed McShane Company a commission on the acquisition of the two properties. Moreover, McFadden gave the fact that he owed McShane Company a real estate commission as one of the reason he could not accomodate a later request by Dr. Howes for an increase in his salary as a Developing Agent for McFadden. McFadden repeated his obligation to G. H. McShane in the early spring of 1973, and again to Hugh McShane that summer.

Under the testimony, we find that when G. H. McShane called McFadden in September of 1971 and described the property in detail, McFadden agreed that he would pay a commission of $150,000.00. The

subsequent events, including the incident of December 20, 1971, corroborate the agreement as made and as reflected in the December 20, 1971 letter quoted above.[1./]

A. THE TERMS OF THE AGREEMENT.

We must then determine whether or not a commission in the amount of $150,000.00 which was not to be paid unless and until "sufficient revenues" were available out of the development of Epworth

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1./ We thus do not have a question here of possible acceptance of the commission contract by silence in connection with the incident of December 20, 1971 [but see Baum's Estate, 274 Pa. 283, 117 A. 684 (1922), or a case in which it may be argued that McFadden, under the circumstances, can be said to be estopped to deny acceptance. See Restatement Contracts §72; Sum.Pa.Jur. Contracts § §203-204 (1955); Gum, Inc. v. Felton, 341 Pa. 96, 17 A.2d 386 (1941). Instead, the contract was created in the parties' initial discussion of September 1971; and the subsequent acts of McFadden in accepting the benefits of McShane's efforts, the letter incident, and McFadden's acknowledgment of his indebtedness to McShane stand not as an acceptance of the contract or as elements tending to establish an estoppel, but rather serve as evidence of an already existing contractual obligation .

Woods or the operation of Smithfield Plaza, is an enforceable agreement. The commission was to be paid out of "revenues" generated from either Smithfield Plaza's operations or development of Epworth Woods which were over and above those necessary to make Smithfield Plaza self-sustaining. We find that McFadden was to pay the commission only when these revenues were "sufficient", and the determination of such sufficiency was left to McFadden's "reasonable judgment". We observe that this is not a situation where the promisor is given an unlimited and unfettered right to determine the time for performance and, thus, an unenforceable promise: see D'Orazio v. Masciantonio, 345 Pa. 428, 29A. 2d 43 (1942); Nelson v. Von Bonnhorst, 29 Pa. 352 (1857). Cf. Field v. Goldern Triangle Broadcasting, Inc., 451 Pa. 410, 305 A.2d 689 (1973), cert. denied 414 U.S. 1158, 94 S. Ct. 916, 39 L.Ed.2d 110 (1974). McFadden was obligated to perform when in the exercise of a reasonable judgment there were sufficient revenues. The facts here presented are analogous to those before the Court in Schleicher v. United Security Life Ins. & Trust Co., 191 Pa. 477, 43A. 380 (1899), where under the terms of the agreement an elevator was to be paid for when it was working to the satisfaction of the owner. The Court held that the time to satisfy

the owner would be construed as being a "reasonable" time and left to the jury the determination of whether or not the plaintiff had such a "reasonable" time. Thus in McFeathers v. Pattison, 188 Pa. 270, 41 A. 609 (1898), a contract provided that a son receive "reasonable" compensation for caring for his father and the Court held the agreement to be enforceable, leaving the question of amount to the jury.

Particularly instructive is Pillois v. Billingsley, 179 F. 2d 205 (2d Cir. 1950), where plaintiff travelled to France on behalf of the defendant and there secured a contract for defendant under an agreement drafted by defendant's attorneys and signed by the plaintiff, which stated (at p. 207):

> "This will confirm our understanding in connection with the exclusive representation of the S. A. Le Galion trade mark under contracts of March 20, 1946 and July 25, 1946, now being held by Cigogne, Inc., a New York corporation by assignment from Chapman & Keane, as follows:
>
> * * *
>
> 'My compensation for such services as I may render in this connection shall be such sum as you, in your sole judgment, may decide is reasonable . . . .'"

Defendant failed to pay plaintiff under the terms of the agreement, and in an action brought by the plaintiff, the Court held (Id.):

> "This letter, as the trial judge held, shows an agreement which is not too indefinite to be enforced, the appellee having performed his part of it. It entitled him to have the appellant in good faith determine the reasonable value of his services and to pay him that amount. Cf. Ake v. Chancey, 5 Cir., 149 F.2d 310. See 1 Williston on Contracts, § 43. And when the appellant failed to make any determination whatever as to what such services were reasonably worth the appellee became entitled to recover as on a quantum meruit basis. Von Reitzenstein v. Tomlinson, 249 N.Y. 60, 162 N.E. 584; Varney v. Ditmars, 217 N.Y. 223, 111 N.E. 822, 823, 825, Ann. Cas. 1916B, 758; Canet v. Smith, 173 App.Div. 241, 159 N.Y.S. 593 (1st Dep't).
>
> We are here dealing with the legal results which flow from the performance by one party to a contract and not with what legal obligations, if any, are created by a wholly executory contract. See 1 Williston on Contracts §49. It may be acknowledged that the appellant was not satisfied with the terms of the contract procured from the French manufacturer because, among other things, the territory embraced in the former contract was diminished, but the fact remains that Cigogne, Inc., did accept it, as both its answer admits and the evidence clearly shows." [Emphasis added]

While the amount of compensation was not fixed in Pillois under a contract which called for reasonable compensation without stating an amount, the Court held as noted above that the party valuing compensation must make such a determination in good faith, pointing up the principle that in a case of a contract fully performed on one side, as is the situation in the instant case, the failure of the contract to set forth an element such as time of payment or amount with exactness will not make the contract void.

Similarly instructive is the language of the Sixth Circuit Court of Appeals in Hogan v. Wright, 356 F.2d 595 (1966), where Wright retained Hogan as his lawyer in settling a construction contract dispute. Hogan billed Wright $15,000.00 for his services and, in addition, offered to prepare a claim for Wright on a related matter before a State Board, stating, "Out of any recovery in your claim, you are to pay me a percentage figure acceptable to you." Wright received $137,314.81 and determined that $2,000.00 would be adequate payment, although the Court found additional services to have a reasonable value of $27,468.36.

The Court stated (at pp. 597-598):

"As a general rule, a wholly executory agreement which reserves to the will and discretion of one party the unlimited right to determine the extent of compensation he will make is too indefinite to be enforceable. I Corbin on Contracts, Section 98; 17 Am.Jur.2d, Contracts, Section 83. Here, however, is a contract where the promisor has fully performed, the promisee has the unlimited right to determine the amount of compensation he will pay the promisor for the services rendered. The cases are in conflict as to the manner of measuring the adequacy of the compensation rendered by the one party. The facts of each case generally suggest the appropriate rule. Recovery has been allowed for the reasonable value of such services where the facts disclose that this was the intention of the parties or where the express reservation to one party to determine the fee is coupled with the provision that the payment to be made shall be 'reasonable', 'fair', 'right', or 'good'. Foster v. Young, 172 Cal. 317, 156 P. 476; Corthell v. Summit Thread Co., 132 Me. 94, 167 A.79, 92 A.L.R. 1391; Pillois v. Billingsley, 179 F.2d 205 (C.A.2, 1949); Millar v. Cuddy, 43 Mich. 273, 5 N.W. 316, 92 A.L.R. 1391. Other cases have held that where the promisor has determined the amount to be paid, no more can be recovered. This is especially true where the promisor has acted in good faith, although the compensation is considerably less than the reasonable value of the services. Lee's Appeal, 53 Conn. 363, 2 A. 758 (1886); Butler v. Winona Mills Co., 28 Minn.

205, 9 N.W. 697 (1881); Tennant v. Fawcett, 94 Tex. 111, 58 S.W. 824 (1900).

No arbitrary formula can be applied. The facts of each case must be considered to determine the intentions of the parties. Their intent should suggest whether the compensation to be paid will be measured in terms of reasonable value or in terms of good faith . . . .

* * *

Since Hogan drafted the contract, he was in a position to state exactly what his terms of employment were. If he wanted a definite percentage of the recovery he could have so stated. If he wanted a reasonable fee, he could have so stated. Where a party competent to contract and skilled in the art of drafting contracts recites therein conditions of his own choosing, in language of his own choosing, he cannot complain when the other party to the contract exercises his rights in good faith."

We conclude that in the matter sub judice there was an enforceable contract. The parties agreed, and the Court finds, that the contract provided that McFadden would pay McShane a real estate commission of $150,000.00 when sufficient revenues existed, and that determination was to be made using a standard of objective reasonableness.

McFadden does not claim that he has made any assessment as to whether or not sufficient revenues exist; however, he now offers evidence that there never were any "revenues".

B. THE MEANING OF "SUFFICIENT REVENUES".

In determining the intention of the parties with respect to the meaning of the term "sufficient revenues", we are reminded by Judge Becker in BBCI, Inc. v. Canada Dry Delaware Val. Bottling Co., 393 F.Supp. 299 (E.D.Pa. 1975) (at p.301):

". . . If [a contract's] provisions are ambiguous or obscure, then its interpretation becomes a question of fact for the jury, and parole evidence is admissible to aid in this interpretation. If its provisions are unambiguous and clear, then its interpretation becomes a question of law for the Judge, and parole evidence is not admissible. The question of whether its provisions are ambiguous or obscure on the one hand, or unambiguous and clear on the other hand, is a question of law for the Judge. [Citations omitted]"

From a reading of the contract it is unclear whether the parties used the term "revenues" to indicate that payment would be made only out of an excess of the difference between receipts and expenses, or whether payment was to be made out of

any monies which might be generated from the properties, regardless of the means of such generation (i.e., by mortgage, selling of options, or only by rental incomes).

Instances can be found where "revenue", because of the particular context in which the word is used, has an easily determined meaning. Thus, in George v. City of Asheville, N.C., 80 F.2d 50 (4th Cir. 1935), in determining whether a municipal water and sewer system was "revenue" producing, revenues were held to mean any income without a determination of net profit.

The American Institute of Certified Public Accountants has stated:

> "Revenue under present generally accepted accounting principles is derived from three general activities: (a) selling products, (b) rendering services and permitting others to use enterprise resources, which result in interest, rent, royalties, fees, and the like, and (c) disposing of resources other than products — for example, plant and equipment or investments in other entities. Revenue does not include receipt of assets purchased, proceeds of borrowing, investments by owners, or adjustments of revenue of prior periods." [Emphasis added] Statement, The Accounting Principles Board 4§148 (1970), CCH 3 Professional Standards §1026.12 (1974).

Consistent with this statement is the language of People v. New York Central R.Co., 24 N.Y. 485 (1862), wherein it was noted (at pp. 489-490):

> ". . . Revenue, when used of individuals [as opposed to governments], is equivalent to income, which is the true sense generally used to designate the annual receipts, and includes receipts from all sources—at least, all permanent sources of profits or rent.
>
> * * *
>
> . . . 'Revenue' is a return for capital invested or labor bestowed. In a general sense, it is the annual rents, profits, interests or issues of any species of property, real or personal, belonging to an individual or the public. . . It is not the money borrowed by the owner. . . ." [Emphasis added]

But in Willoughby v. Willoughby, 66 R.I. 430, 19 A.2d 857 (1941), decedent's will contained a provision that his wife, during her life or widowhood, should receive all of the revenues of his estate. In determining testator's intentions, the Court stated (19 A.2d at p. 860):

> "In Webster's New International Dictionary, 2d. Ed., p. 2132, the word 'revenue', in both singular and plural forms, is defined as 'Return; yield, as of land; profit. * * * That

which returns, or comes back, from an investment; the annual or periodical rents, profits, interest, or issues, of any species of property, real or personal; income.' See also People v. New York Central R.R. Co., 24 N.Y. 485, 490; Bates v. Porter, 74 Cal. 224, 15 P. 732. There being nothing in the will before us to indicate that the word 'revenues' was used by the testator with any special meaning, it is clear to us that it was testator's intention to devise and bequeath to his wife for her life, provided she remained his widow, the 'net income' from all his property, . . ." [Emphasis added]

Webster's Third New International Dictionary (1971) defines revenue (as here relevant) as, "the income that comes back from an investment", "the annual or periodical rents, profits, interest, or issues", "investment income as distinguished from salary, wages, or donations", "an item of income", "the total income produced by a given source".

We conclude that while the term revenue has no legally definable meaning, the term under the circumstances of this case does not include the proceeds of loans such as the GAMI loan here.

C. REVENUE AS PROFIT.

The record here reveals that gross rental income from Smithfield Plaza from September, 1972

through August, 1975, was $1,066,361.65. The sale of an option in connection with the Epworth Woods operations generated cash in the amount of $51,068.00. However, the net loss on the operations of Smithfield Plaza was $3,590,816.00 and the net operating loss on Epworth Woods was $492,019.00. Smithfield Plaza, because of its low occupancy rate, was at least a short term money loser. This was precisely why MCU combined Smithfield Plaza with Epworth Woods into one package. It was hoped that Epworth Woods would develop quickly and generate funds large enough to equalize the losses from Smithfield Plaza until its occupancy reached a self-sustaining level of income. Apparently, this was the reason the commission was made payable only when, by reasonable judgment, funds were found to be sufficient to pay the commission from either (1) Smithfield Plaza's net funds, or (2) those of Epworth Woods. Neither of the parties contemplated that gross receipts would be the basis for calculation of "sufficient revenues".

G. H. McShane initially stated in his deposition that he understood "revenues" to include only income in excess of the operational costs of the properties. When questioned further, he then amplified and refined his statement, as follows:

"Q By revenues, you would mean to include money that was raised by way of a loan?

A Sale, loan, anything, as long as it is cash, yes, sir."

That position was adopted again by McShane at the trial. However, the Court finds it highly significant that counsel for McShane did not urge the Court to weigh the gross rentals from Smithfield Plaza in determining whether "sufficient revenues" had been accumulated, claiming only that we should look to the $1,300,000.00 excess of the GAMI loan.[2./]

2./ We have already noted that the GAMI loan proceeds are not properly includable as "revenues"; we thus cannot say that McFadden should have paid the McShane Company commission directly out of those proceeds. However, even if we were to find that McFadden improperly applied the loan proceeds and thereby acted in derrogation of the contract, it would be highly speculative and therefore improper for this Court to hold under the evidence that the GAMI loan proceeds, spent on the development of Epworth Woods, would have generated enough revenue to sustain Smithfield Plaza until it became self-sufficient, much less hold that those revenues would have been sufficient to sustain Smithfield Plaza with revenues remaining. [See note 3, infra.]

III. CONCLUSION.

We find that the contract's "sufficient revenues" provision did not include the proceeds of loans. We further conclude that the term was used to cover gross profit, and that a determination of the existence of such gross profit was to be made based on the occurrence of one of two alternatives,[3./] as detailed above. Given these findings, it is clear to this Court that although McFadden did not make the

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3./ Counsel have vigorously argued their respective positions as to the effect of McFadden's sale of Epworth Woods. Counsel for McShane Co. urges that these actions constituted an anticipatory breach of the commission contract and that such a breach gives rise to an action for the reasonable value of the services provided. Cameron v. Eynon, 332 Pa. 529, 3 A.2d 423 (1939). Defendant on the other hand claims that the doctrine of anticipatory breach has no application to situations such as this where the contract is fully performed on one side, citing inter alia Mack v. Revicki, 47 N.J. Super. 185, 135 A.2d 569 (1957). See also, Smyth v. United States, 302 U.S. 329, 58 S.Ct. 248, 82 L.Ed. 294, 295 (1937); Annot., 105 A.L.R. 460. Although we agree with Defendant's general statement of the law, we note that the cases he cites are distinguishable from the case at bar. For example, Mack did not involve, as here, a situation wherein the defendant sold the land which was the basis for calculating the sufficiency of revenues.

[continued]

required good faith, reasonable evaluation of the existence of sufficient revenues, such revenues did not in fact exist. The Plaintiff has therefore failed to prove an essential element of his case, namely, that the contingency provided for in the contract occurred. Judgment will be entered in favor of the Defendant and against the Plaintiff, without

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Footnote 3 continued /

This Court views the problem of McFadden's sale of Epworth Woods as covered by §295 of the Restatement of Contracts, which provides:

> "If a promisor prevents or hinders the occurrence of a condition, or the performance of a return promise, and the condition would have occurred or the performance of the return promise been rendered except for such prevention or hindrance, the condition is excused, and the actual or threatened nonperformance of the return promise does not discharge the promisor's duty, unless
>
> (a) the prevention or hindrance by the promisor is caused or justified by the conduct or pecuniary circumstances of the other party; or
>
> (b) the terms of the contract are such that the risk of such prevention or hindrance as occurs is assumed by the other party."

As this Court reads §295, McShane Co., the party asserting excuse of a condition imposed by the contract, is bound to come forward with proof tending to show that the condition, to-wit, sufficient revenue would have occurred but for McFadden's sale of Epworth Woods. Hartman v. Meighan, 171 Pa. 46,

prejudice to the rights of the Plaintiff from showing in another case that the contingency has been satisfied.

The foregoing constitutes the Court's Findings of Fact and Conclusions of Law, as required by Rule 52(a), Federal Rules of Civil Procedure, and an appropriate Order will be entered.

s/ Daniel J. Snyder, Jr.
United States District Judge

Dated: March 15, 1976

Footnote 3 continued /

33A.123 (1895), although standing for the proposition that a party who fails to perform on the basis that he was prevented from doing so must prove that he was so prevented, also supports, in our view, the conclusion that McShane here was obligated to prove by a fair preponderance of the evidence that the condition was not met because of the breach. We further believe that in this case the credible evidence indicates that McFadden's sale of Epworth Woods did not affect the fact that there did not exist sufficient revenues (as we have determined that term to be) for the payment of the commission contract. Thus, because it has not been proven that "the condition [the existence of sufficient revenues] would have occurred . . . except for such prevention or hindrance" [McFadden's sale of Epworth Woods], and McShane's claim on this ground, which was not the subject of a contract provision, must accordingly fail.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

G.H. McSHANE CO., INC.,	:	
	:	
Plaintiff	:	
	:	
vs.	:	Civil Action 74-1046
	:	
WARREN A. McFADDEN,	:	
	:	
Defendant	:	

JUDGMENT ORDER

AND NOW, to-wit, this 15th day of March, 1976, after due consideration of the Claim of the Plaintiff, G. H. McShane Co., Inc. against the Defendant, Warren A. McFadden, after Non-Jury Trial, and in accordance with the Opinion of this Court filed simultaneously herewith,

IT IS ORDERED that judgment be and the same is hereby entered in favor of the Defendant, Warren A. McFadden, and against the Plaintiff, G. H. McShane Co., Inc.

IT IS FURTHER ORDERED that this judgment is entered without prejudice to the rights of

the Plaintiff G. H. McShane Co., Inc., to claim in another action that sufficient revenues exist to pay his claim.

s/ Daniel J. Snyder, Jr.
United States District Judge

cc David L. McClenahan, Esq.
1500 Oliver Building 15222

Edmund K. Trent, Esq.
747 Union Trust Building 15219

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

G. H. McSHANE CO., INC., a corporation,	)	
Plaintiff	)	
vs.	)	Civil Action No. 74—1046
WARREN A. McFADDEN, an individual,	)	
Defendant	)	

OPINION AND ORDER

SNYDER, J.

The Defendant has filed a Motion to Vacate Dismissal of his Counterclaim. The Plaintiff, a Pennsylvania corporation, filed suit in assumpsit on October 1, 1974 in the Court of Common Pleas of Allegheny County to collect a real estate broker's commission and began its action with writs of foreign attachment seizing Defendant's rents from certain

property located in the City of Pittsburgh[1./] The Defendant being a resident of Florida, removed the case to Federal Court here, entered a general appearance, and demanded the Plaintiff release the attachment. When the Plaintiff refused to do so, the Defendant filed suit to enjoin continuance of the attachment on the grounds that the Pennsylvania foreign attachment procedure was unconstitutional. Defendant filed an Answer to the Complaint in the foreign attachment proceedings denying the indebted-

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1./ Pennsylvania Rule of Civil Procedure 1252 provides:

"A foreign attachment may be issued to attach property of a defendant not exempt from execution upon any cause of action at law or in equity, other than an action ex delicto arising from acts commited outside the Commonwealth which is not required to be joined with an action of assumpsit under Rule 1020(d)(1), in which the relief sought includes a judgment or decree for the payment of money when

(1) the defendant is an individual who is a nonresident of the Commonwealth, even though he is present in the Commonwealth;

(2) the defendant is a partnership or an unincorporated association without a regular place of business in the Commonwealth and the action is against the defendant in its firm or association name, even though one or more members of the partnership or association are present in or are residents of the Commonwealth;

(3) the defendant is a foreign corporation or similar entity which is not registered in the Commonwealth." (Emphasis added.)

ness and counterclaiming for damages caused by the alleged unlawful attachment which Plaintiff McShane had obtained by use of Pennsylvania's Rules of Civil Procedure.2./

Upon consolidation of the two actions, the Honorable Wallace S. Gourley of this Court dismissed the McFadden injunction suit and dismissed the McFadden Counterclaim in the matter sub judice, holding in both cases that the Pennsylvania foreign attachment procedure was not unconstitutional.

McFadden appealed from the dismissal of the injunction suit and the Court of Appeals vacated the order and remanded the cause for hearing before a Three Judge Court (519 F.2d 1398). After argument on the stipulated record, the Three Judge Court filed an opinion on February 2, 1976, finding Pennsylvania's foreign attachment procedure unconstitutional, and on February 18, 1976, enjoined the attachment of McFadden's rents.

Meanwhile, Plaintiff's claim for the real estate

2./ Foreign attachment is a form of process not a type of action, Posner v Sheridan, 451 Pa. 51, 299 A(2d) 309 (1973), quoting Goodrich-Amram.

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commission had been tried on its merits to the Court and on March 15, 1976, judgment was entered for the Defendant. On March 25, 1976, the Defendant filed the instant Motion to Vacate Dismissal of his Counterclaim setting forth that the Order of Dismissal entered December 2, 1974 did not contain direction for the entry of final judgment under Rule 54(b) of the Federal Rules of Civil Procedure, was therefore not appealable, and was proper for consideration at this time.3./ Defendant's Motion will be denied.

I. THE PROCEDURAL ASPECT.

Defendant McFadden contends that his Counterclaim was dismissed solely on the ground that Pennsylvania's foreign attachment procedure was not unconstitutional and that that ground has been conclusively held to be incorrect. Initially, the Defendant claimed that the dismissal should be vacated, the Counterclaim reinstated, and the Plaintiff ordered to plead to it. However, counsel has now filed

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3./ Plaintiff does not contend otherwise.

a Stipulatio that:

> ". . . the Court may consider and determine the broad question of whether said counterclaim fails to state a claim upon which relief can be granted because it calls for the retroactive application of a new principle of law, rather than limit its consideration to the narrower question of whether the basis for this Court's dismissal of defendant's counterclaim in its Order dated January 31, 1975, was incorrect."

Fuentes v Shevin and its companion, Parham v. Cortese, 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed.2d 556, reh. denied 409 U.S. 902, 93 S. Ct. 177, 34 L.Ed.2d 165 (hereinafter Fuentes), were argued before the Supreme Court on November 9, 1971 and decided on June 12, 1972. In an opinion by Justice Stewart, expressing the views of four members of the Court, the replevin laws of both Florida and Pennsylvania were declared as violative of the Due Process Clause of the Fourteenth Amendment as they denied the right to prior opportunity to be heard before chattels were taken from their possessor, notwithstanding that possession could be regained by posting security bond, and holding that such replevin laws served no such important governmental or general public interest as would justify postponement of the due process right to an opportunity for hearing until after the seizure

of property. Justices Powell and Rehnquist did not participate in the decision, and Justice White was joined by Chief Justice Burger and Justice Blackmun in dissenting, on the grounds that when the Federal actions were filed, replevin proceedings were in progress in State Court at which time the constitutional objections to the replevin laws could have been raised, there being no allegations in the Federal Courts of bad faith, harassment, or irreparable injury.

Counsel for the Defendant argues on the basis of Fuentes, that the Plaintiff in the case sub judice seized the Defendant's property two years after Fuentes by resorting to a writ even more objectionable than the writ of replevin used in Fuentes. He contends the foreign attachment in this case did not afford the Defendant protection of a surety bond and, since Plaintiff resorted to such a writ after Fuentes, it did so knowing that the writ of foreign attachment was a fortiori unconstitutional since it lacked even the replevin bond requirement. He cites Highley Hill, Inc. v. Knight, 360 F.Sup. (D. Mass. 1973), where the plaintiffs filed suit in Federal Court to enjoin attachment of their property in the State Court, on the ground that Fuentes outlawed the use of the Massachusetts attachment procedure available in the

filing of a bill in equity, the attachments having been authorized in advance by the State Court Judge ex parte. The Three Judge Court denied plaintiff's motion for a preliminary injunction permitting the question to be considered by the State Court Judge at a new hearing scheduled for the day following that on which the opinion was handed down. With respect to the retroactivity of Fuentes, the District Court pointed out that the Supreme Court's opinion gave notice not merely that writs of replevin were illegal but that all prejudgment attachments were suspect, saying through Circuit Judge Campbell (at p. 205):

> ". . . After Fuentes, the bar, the legislature and the courts were on notice that the long-established Massachusetts pre-judgment attachments rules were, at very least, suspect. They knew, or should have known, that attachments made without notice and hearing opportunity were governed by principles spelled out in Fuentes. Accordingly, state plaintiffs generally can have little complaint if such later attachments are invalidated."

There is, however, a long step to be taken between a process being "suspect" and liability for damages if such suspect process is used. It would serve no useful purpose to recite the rather tortured history of the constitutional attacks upon the writ of foreign attachment which were engaged in unsuccess-

fully in Pennsylvania for about one hundred and forty years.[4./] Suffice it, at this point, to mention that Judge Teitelbaum of this Court first held the Pennsylvania foreign attachment procedures to be unconstitutional by his opinion filed April 7, 1975 in the case of Jonnet v. Dollar Savings Bank of City of New York, 392 F.2d 1385, affirmed Third Circuit Court of Appeals, Slip Opinion filed January 27, 1976, relying heavily on the Supreme Court opinion in North Georgia Finishing, Inc. v. Di-chem, Inc., 419 U.S. 601, 95 S. Ct. 719, 42 L.Ed.2d 751 (1975), involving the constitutionality of a Georgia statute under which the

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4./ In 1972 the Third Circuit expressly upheld the constitutionality of the Pennsylvania foreign attachment rules in Lebowitz v. Forbes Leasing and Finance Corporation, 456 F.2d 979 (3d Cir. 1972), cert. denied 409 U.S. 843, 93 S.Ct. 42, 34 L.Ed.2d 82 (1972), rehearing denied 409 U.S. 1049, 93 S.Ct. 509, 34 L.Ed.2d 502 (1972).

Judge Rosenberg of this Court found that the Pennsylvania foreign attachment rules were not violative of the Constitution in an opinion issued September 6, 1974, less than a month before plaintiff's praecipe for writ of attachment in the present case was filed. Balter v. Bato Co., 385 F.Supp. 420 (W.D.Pa. 1974).

Judge Gourley of this Court upheld the foreign attachment rules in his Opinion dated December 2, 1974, in the case of McFadden v. G. H. McShane Co., supra.

[Continued on next page.]

plaintiff corporation had garnished defendant's bank account by issuance of a writ of garnishment on the affidavit of the plaintiff without participation of a judge, upon the posting of bond for double the amount sworn to be due. Thus, it is noted that the Pennsylvania Rule of Civil Procedure regarding foreign attachments had not been declared invalid in October of 1974 when the Plaintiff brought the instant action and sought to make use of the Rules. It then becomes apparent that the sole basis for the Defendant's Counterclaim in the case sub judice must

Footnote 4 continued /

In the case of Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), the Supreme Court expressly acknowledged that the State's need to obtain immediate jurisdiction over nonresident defendants in state courts was "clearly a most basic and important public interest" which justified the attachment of property without prior notice or hearing. 32 L.Ed.2d at 576, n. 23.

In the case of Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974), decided after Fuentes, the Supreme Court upheld the validity of a Louisiana statute which permitted the sequestration of property upon the ex parte application of a creditor without notice or hearing. In so holding the Court clearly receded from the sweeping language set forth in its Fuentes decision, to the extent that Justice Stewart (who wrote the opinion in Fuentes) concluded that Fuentes had been "unmistakably overruled." 40 L.Ed. 2d at 429.

be that the Jonnet decision should be applied retroactively. Fuentes cannot be the basis for such suit for there is an interest of the State involved in jurisdiction over non-residents.

It is noted that in Fuentes, the Supreme Court was concerned that the State did not have an important governmental or general public interest to justify the postponement of the due process rights to an opportunity for hearing until after the seizure of the property. Thus, Justice Stewart said (32 L. Ed.2d 556 at p. 576):

". . . First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food.

The Florida and Pennsylvania prejudgment replevin statutes serve no such important

governmental or general public interest. They allow summary seizure of a person's possessions when no more than private gain is directly at stake. The replevin of chattels, as in the present cases, may satisfy a debt or settle a score. But state intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health.

Nor do the broadly drawn Florida and Pennsylvania statutes limit the summary seizure of goods to special situations demanding prompt action. There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods. But the statutes before us are not 'narrowly drawn to meet any such unusual condition.' Sniadach v Family Finance Corp., supra, at 339, 23 L Ed 2d st 352. And no such unusual situation is presented by the facts of these cases.

The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark." [Footnotes omitted.]

And in particular, the Court noted (at p. 576, n. 23):

". . . In three cases, the Court has allowed the attachment of property without a prior hearing. In one, the attachment was necessary to protect the public against the same sort of immediate harm involved in the seizure cases - a bank failure. Coffin Bros. & Co. v. Bennett, 277 US 29, 72 L Ed 768, 48 S Ct 422. Another case involved attachment necessary to secure jurisdiction in state court clearly a most basic and important public interest. Ownbey v Morgan, 256 US 94, 65 L Ed 837, 41 S Ct 433, 17 ALR 873. It is much less clear what interests were involved in the third case, decided with an unexplicated per curiam opinion simply citing Coffin Bros. and Ownbey. McKay v McInnes, 279 US 820, 73 L Ed 975, 49 S Ct 344. . . ."

We must further consider the Supreme Court's decision in Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L.Ed.2d 406 (1974), which was decided after Fuentes, supra, and less than five months before the filing of the Plaintiff's writ of foreign attachment in the present case. There, Justice White in an opinion expressing the view of five members of the Court, held that issuance of a sequestration writ without notice and hearing did not violate procedural due process since the Louisiana system adequately protected the debtor's interest, and that where only property rights are involved, mere postponement of judicial inquiry is not a denial of due process if the opportunity given for ultimate

judicial determination of liability is adequate. The Court held as follows (at pp.416417):

> ". . . The usual rule has been '[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.' Phillips v Commissioner, 283 US 589, 596-597, 75 L Ed 1289, 51 S Ct 608 (1931). See also Scottish Union & National Ins Co. v. Bowland, 196 U S 611, 632, 49 L Ed 619, 25 S Ct 345 (1905); Springer v. United States, 102 US 586, 593-594, 26 L Ed 253 (1881). This generality sufficed to decide relatively modern cases. For example, in Ewing v. Mytinger & Casselberry, 339 US 594, 94 L Ed 1088, 70 S Ct 870 (1950), the statute at issue permitted multiple seizures of misbranded articles in commerce "when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the misbranded article . . . would be in a material respect misleading to the injury or damage of the purchaser or consumer.'" Id., at 595-596, 26 L Ed 253. The specific seizure challenged, made administratively without prior notice or hearing, concerned a concentrate of alfalfa, watercress, parsley, and synthetic vitamins, combined in a package with mineral tablets. There was no claim or suggestion of any possible threat to health. The sole official claim was that the labeling was misleading to the alleged damage of the purchaser. The Court sustained the ex parte seizure saying that '[w]e have repeatedly held that no hearing . . . is required by due process so long as the requisite hearing is held before the final administrative order becomes effective.' Id., at 598, 26 L Ed 153. 'It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.' Id., at 599, 26 L Ed 253.

More precisely in point, the Court had unanimously approved prejudgment attachment liens effected by creditors, without notice, hearing, or judicial order, saying that 'nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit.' 'The fact that the execution is issued in the first instance by an agent of the State but not from a Court, followed as it is by personal notice and a right to take the case into court, is a familiar method in Georgia and is open to no objection.' Coffin Bros. v Bennet, 277 US 29, 31, 72 L Ed 768, 48 S Ct 422 (1928). To the same effect was the earlier case of Ownbey v. Morgan, 256 US 94, 65 L Ed 837, 41 S Ct 433, 17 ALR 873 (1921). Furthermore, based on Ownbey and Coffin, the Court later sustained the constitutionality of the Maine attachment statute. McKay v McInnes, 279 US 820, 73 L Ed 975, 49 S Ct 344 (1929). In that case, a nonresident of Maine sued in the Maine courts to collect a debt from a resident of the State. As permitted by statute, and as an integral part of instituting the suit, the creditor attached the properties of the defendant, without notice and without judicial process of any kind. In sustaining the procedure, the Maine Supreme Court, 127 Me 110, 141 A 699 (1928), described the attachment as designed to create a lien for the creditor at the outset of

the litigation. 'Its purpose is simply to secure to the creditor the property which the debtor has at the time it is made so that it may be seized and levied upon in satisfaction of the debt after judgment and execution may be obtained.' Id., at 115, 141 A, at 702. The attachment was deemed 'part of the remedy provided for the collection of the debt,' ibid., and represented a practice that 'had become fully established in Massachusetts, part of which Maine was at the time of the adoption of the Federal Constitution.' Id., at 114, 141 A at 702. The judgment of the Maine court was affirmed without opinion, citing Ownbey and Coffin." [Footnote omitted.]

In Mitchell, supra, Justice Stewart dissented on the basis that the Court had rejected the reasoning of the Fuentes case and had adopted instead the analysis of the dissent. Justice Stewart went so far as to say (at p. 429):

> "I would add, however, a word of concern. It seems to me that unless we respect the constitutional decisions of this Court, we can hardly expect that others will do so. Cf. Roofing Wholesale Co. v. Palmer, 108 Ariz 508, 502P2d 1327 (1972). A substantial departure from precedent can only be justified, I had thought, in the light of experience with the application of the rule to be abandoned or in the light of an altered historic environment. Yet the Court today has unmistakably overruled a considered decision of this Court that is barely two years old, without pointing to any change in either societal perceptions or basic constitutional understandings that might justify this total disregard of stare decisis."

Defendant in this case would require the Plaintiff not only to guess, but to guess right, on a very important procedural matter. It is therefore abundantly clear that Fuentes did not foreshadow an end to the Pennsylvania foreign attachment procedures as indicated by the opinions of two members of this Court, Judges Rosenberg and Gourley,[5./] upholding the constitutionality of the foreign attachment procedures of this State in late 1974.

II. RETROACTIVITY.

Having disposed of the contention that Fuentes clearly foreshadowed an end to Pennsylvania's foreign attachment procedures, we now turn to the contention that the decision in Jonnet, which found the Pennsylvania rules on foreign attachment to be unconstitutional, filed fifteen months after the Defendant McFadden's Counterclaim, should be applied retroactively sub judice.

There is very clear guidance in Chevron Oil Co. v. Huson, 404 U. S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), which held that a Louisiana statute of

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5./ See Footnote 1, supra.

limitations should not be given retroactive application under the Supreme Court decision in Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352, 89 S. Ct. 1835, 23 L.Ed.2d 360 (1969), because the case had been first filed more than one year prior to the Rodrigue decision and because Rodrigue resulted in an unforseeable overturning of existing legal doctrine. The Court stated as follows in Chevron, supra (30 L.Ed.2d 306):

> "In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e. g. Hanover Shoe v. United Shoe Machinery Corp., supra, at 496, 20 L Ed 2d at 1243, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see e. g., Allen v State Board of Elections, supra, at 572, 22 L Ed 2d at 20. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation,' Linkletter v Walker, supra, at 629, 14 L Ed 2d at 608. Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' Cipriano v City of Houma, supra,

at 706, 23 L Ed 2d at 652.

Upon consideration of each of these factors, we conclude that the Louisiana one-year statute of limitations should not be applied retroactively in the present case. Rodrigue was not only a case of first impression in this Court under the Lands Act, but it also effectively overruled a long line of decisions by the Court of Appeals for the Fifth Circuit holding that admiralty law, including the doctrine of laches, applies through the Lands Act. See, e. g., Pure Oil Co. v. Snipes, 293 F2d 60; Movible Offshore Co. v Ousley, 346 F2d 870; Loffland Bros. Co. v Roberts, 386 F2d 540. When the respondent was injured, for the next two years until he instituted his lawsuit, and for the ensuing year of pretrial proceedings, these Court of Appeals decisions represented the law governing his case. It cannot be assumed that he did or could forsee that this consistent interpretation of the Lands Act would be overturned. The most he could do was to rely on the law as it then was. 'We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights,' Griffin v Illinois, 351 US 12, 26, 100 L Ed 891, 903, 76 S Ct 585, 55 ALR 2d 1055 (Frankfurter, J., concurring in judgment)."

In the instant case we find the same factors involved for the Jonnet decision rendered unconstitutional a statute which had been in use in Pennsylvania for one hundred and forty years. The Jonnet case will be extended to retard future prejudgment attach-

ments of property, as applied prospectively and not punishing retrospectively. Clearly, to hold otherwise would produce inequitable results. A consideration of the three factors then leads this Court to the conclusion that it should not be retroactively applied. See also Kacher v. Pittsburgh National Bank, decided by this Court (C.A. 75-610, October 20, 1975).

The Defendant strongly urges that the decision changing the law was not Jonnet, but Fuentes. However, we believe this to be clearly in error. It cannot be argued, as Defendant would, that the Plaintiff knew that seizure of Defendant's rents without prior court approval was unlawful under Fuentes and Mitchell, and a fortiori that its refusal to release the attachments after Defendant had entered a general appearance was completely without justification. The Defendant in a rather emotional appeal states that he could have used in his Counterclaim the phrase long employed in pleading at Common Law, that the Plaintiff's conduct was "prompted by the devil". This appeals more to the Court as being a clear indication that there is no rationale in the Defendant's position. The Motion to Vacate Dismissal of Counterclaim will therefore be denied.

An appropriate Order will be entered.

O R D E R

AND NOW, to-wit, this 19th day of May, 1976, after hearing and due consideration of the arguments and briefs of counsel, and for the reasons set forth in the foregoing Opinion,

IT IS HEREBY ORDERED that the Defendant's Motion to Vacate Dismissal of his Counterclaim be and the same is hereby denied.

s/ Daniel J. Snyder, Jr.
UNITED STATES DISTRICT JUDGE

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UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 76-1954

G. H. McSHANE COMPANY, INCORPORATED,
a corporation

v.

WARREN A. McFADDEN, an individual,
Appellant.

On Appeal From The United States District Court
For The Western District of Pennsylvania

Civil No. 74-1046

Argued February 23, 1977

Before: Biggs, Adams and Hunter, Circuit Judges

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Attorneys for Appellee

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OPINION OF THE COURT

(Filed April 26, 1977)

Adams, Circuit Judge

This appeal presents two issues. The first is whether an owner of property whose rents were seized pursuant to the Pennsylvania foreign attachment procedures[1] may recover damages when, at the time of the seizure, there may have been some doubt concerning the constitutionality of such attachment provisions. The second question, entwined with the first, is whether Jonnet v. Dollar Savings Bank of the City of New York,[2] which expressly invalidated

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1. Pa. R. Civ. P. 1251-1279.

2. 530 F.2d 1123 (3d Cir. 1976).

Pennsylvania's foreign attachment procedures, should be applied retroactively so as to permit damages in this case, an action pending when Jonnet was handed down.

Since resolution of these matters is governed by Kacher v. Pittsburgh National Bank,[3] only recently decided by this Court, we affirm the judgment of the district court.

I.

The procedural history of this litigation is extraordinarily knotty. For purposes of this appeal, we shall outline only its most salient aspects.

In October of 1974, plaintiff G. H. McShane Company, a realty concern, brought an action in assumpsit in state court against defendant Warren A. McFadden. McShane initiated the suit by writ of foreign attachment, seizing the rents from property that was situated in Pittsburgh and owned by McFadden.[4] The underlying claim asserted by McShane was

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3. 545 F.2d 842 (3d Cir. 1976).

4. McShane was able to employ the foreign attachment device because McFadden was a resident of Florida.

for a real estate brokerage commission of $150,000, purportedly due when McFadden purchased the attached property and other real estate.

Although McFadden entered a general appearance in a timely fashion, McShane refused to release the attachments. Thereafter, McFadden denied the indebtedness, and counterclaimed under 42 U.S.C. § 1983 for damages allegedly caused when McShane employed the attachment procedure that McFadden maintains was unconstitutional. McFadden then instituted his own suit in state court in which he sought to enjoin further attachment of the rents, reiterating his constitutional challenge to the foreign attachment mechanism that McShane continued to employ.

Both lawsuits were removed to federal court, where they were consolidated. The district judge dismissed McFadden's suit for injunctive relief and also the counterclaim for damages in the action that had been brought by McShane. In so doing, the trial court relied on two cases decided in this Circuit subsequent to Fuentes v. Shevin[5] — cases in which the constitutionality of the Pennsylvania foreign

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5. 407 U.S. 67 (1972).

attachment statutes had been upheld.[6] McFadden then appealed the dismissal of his injunctive suit,[7] and, in July of 1975, this Court vacated that dismissal. The case was remanded to a three-judge panel of the district court, since the constitutionality of a state-wide foreign attachment rule had been challenged.[8]

Subsequently, in January of 1976, this Court held, in Jonnet, that the Pennsylvania foreign attachment arrangement was unconstitutional as a denial of due process. Six days later, on the basis of Jonnet, the three-judge district court ruled favorably on McFadden's constitutional claims in his suit for injunctive relief, and further attachment of the rents by McShane was enjoined.

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6. Lebowitz v. Forbes Leasing & Finance Corp., 456 F.2d 979 (3d Cir. 1972), cert. denied 409 U.S. 843, rehearing denied 409 U.S. 1049 (1972); Batter v. Bato Co., Inc., 385 F. Supp. 420 (W.D. Pa. 1974).

7. No appeal could be taken, at that time, from the dismissal of the counterclaim for damages, since no final order had been entered by the district court. See Fed. R. Civ. P. 54(b).

8. Shortly after the remand, it should be noted, the mortgage on the subject property was foreclosed because the attachment of the rents had precluded McFadden from using such monies to meet his obligations under the mortgage.

Several weeks following the disposition of the injunction action, the district court, to which McShane's original suit had been removed, determined that McFadden was not liable on McShane's claim for the brokerage commission. At that juncture, McFadden moved to vacate the previous dismissal of his counterclaim for damages under § 1983. However, the trial judge denied such motion on the ground that Jonnet should not be applied retroactively. This appeal then ensued.[9]

II.

McFadden asserts that the district court erred when it dismissed, and then refused to reinstate, his counterclaim for damages under § 1983. He argues, first, that the Pennsylvania foreign attachment procedure employed by McShane had, in effect, been declared unconstitutional two years earlier in Fuentes, a landmark decision which forbade prejudgment seizure of a defendant's property without notice or hearing. Alternatively, McFadden contends

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9. The jurisdiction of this Court over the present appeal is grounded on 28 U.S.C. § 1291.

that, even if it did not strike down the foreign attachment provisions at issue here, Fuentes so clearly foreshadowed their demise as to charge McShane with knowledge of their invalidity and of his potential liability in damages for utilizing such a procedure.

In response, McShane contends that, even if Fuentes did cast doubt on the constitutionality of the Pennsylvania foreign attachment provisions, it had a right to rely on their continued force until they were expressly annulled by this Court or at least by one of the district courts in this Circuit.

Whatever may have been the views of individual members of the present panel regarding Kacher, that recent opinion by this Court is controlling on the issue debated by the parties here. In Kacher, the holder of a security interest had replevied the secured property in the hands of the debtor after the decision of the Supreme Court in Sniadach v. Family Finance Corp.,[10] but before Fuentes was handed down. The argument of the debtor in Kacher would have required the creditor to predict the result in Fuentes on the basis of Sniadach.

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10. 395 U.S. 337 (1969).

But this Court held in Kacher that parties are justified in relying on state procedures until such procedures are specifically overturned, even though a Supreme Court decision may have rendered their vitality questionable. To do otherwise, the Kacher Court indicated, would " 'work an injustice on those . . . who acted in accordance with a time-honored and court-tested proceeding.' "[11]

III.

McFadden tenders a second justification for a recovery of damages under § 1983 for McShane's use of the statutory attachment procedures. He maintains that the appeal in his injunctive suit may have induced this Court to hold as it did in Jonnet, and that he thus should be awarded, in his damage counterclaim in McShane's action, the fruits of his successful challenge. In essence, McFadden insists that he is entitled to a retroactive application of Jonnet.

It is clear that the constitutional question regarding the foreign attachment provision was

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11. 545 F.2d at 846.

adjudicated by this Court in Jonnet. And the three-judge court properly bestowed the benefits of Jonnet on McFadden when it enjoined the prospective attachment of his rents. Yet it does not follow that McFadden should prevail in his request that Jonnet be applied retroactively to attachments made before that decision was rendered — specifically, to secure monetary damages from a potential creditor who acted under a presumptively constitutional statutory scheme. Presented with a parallel situation in Kacher, this Court ruled that § 1983 does not establish a right to recover damages from an individual who followed a statutory scheme that had not yet been held unconstitutional when so utilized.[12]

It should be noted that Kacher suggested that the damage issue could be viewed in terms of the analogous common law tort of malicious prosecution. This Court declared that, under the facts as they existed in Kacher, the plaintiff would have to allege and prove wrongful motive on the part of the creditor

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12. In so doing, the Kacher Court relied, in large part, on opinions of the Second and Tenth Circuits that had reached a similar conclusion. Tucker v. Maher, 497 F.2d 1309 (2d Cir. 1974); Rios v. Cessna Finance Corp., 488 F.2d 25 (10th Cir. 1973).

in order to hold him answerable in damages. While there are some indications that McFadden may be able to make out a case on the question of motive, like the Court in Kacher, we do not reach that question, since that issue is not before us, not having been raised in the pleadings.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United
States Court of Appeals
for the Third Circuit.

UNITED STATES COURT OF APPEALS
for the Third Circuit
No. 76-1954

G. H. McSHANE COMPANY, INCORPORATED
a corporation

vs.

WARREN A. MCFADDEN, an individual,
Appellant

(D. C Civil Action No. 74-1046)
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, ADAMS and HUNTER, Circuit Judges,

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel February 23, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, filed February 3, 1975, and May 19, 1976, be, and the same are hereby affirmed. Costs taxed against the appellant.

ATTEST:

s/ M. Elizabeth Ferguson
Chief Deputy Clerk

April 26, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WARREN A. McFADDEN	)	
	)	
v.	)	Civil Action
	)	No. 74-1090
G. H. McSHANE CO., INC., et al.	)	

OPINION

By this proceeding, plaintiff seeks to have declared unconstitutional Pennsylvania Rules of Civil Procedure which pertain to the issuance of a writ of foreign attachment and to that end has requested a temporary restraining order and the appointment of a three-judge court. In addition thereto, the immediate matter before the Court is defendant's motion to dismiss.

The Court has afforded the parties a complete hearing and must conclude that there is no basis for the granting of a temporary restraining order, nor would the appointment of a three-judge court be appropriate. Very simply stated, the Court cannot conclude, based on a fair preponderance of all

credible evidence, that plaintiff would ultimately prevail on his complaint. A three-judge court should not be convened where the federal constitutional attack upon state law is insubstantial. Goosby v. Osser, 409 U.S. 512 (1973). With respect to plaintiff's foreign attachment proceeding, the Court is convinced that said procedure satisfies federal constitutional requirements. In Balter v. The Bato Company, Ltd., Civil Action No. 74-206 (W.D. Pa., Sept. 6, 1974), a most well reasoned opinion of the Honorable Louis Rosenberg, a similar attack on Pennsylvania's foreign attachment procedure was found to be without merit. In addition, Judge Rosenberg specifically rejected one of plaintiff's contentions in this proceeding that a general appearance by a non-resident defendant removes any reason for the continuation of an attachment. Moreover, the Court is satisfied that the foreign attachment procedure in Pennsylvania remains constitutionally viable and has not been in any way undermined by Fuentes v. Shevin, 407 U.S. 67 (1972). The United States Court of Appeals for the Third Circuit has specifically upheld the Pennsylvania foreign attachment procedure while Fuentes did not deal directly therewith. Lebowitz v. Forbes Leasing and Finance Corp., 456 F.2d 976 (3d Cir. 1972).

In view of the foregoing, plaintiff's request for a temporary restraining order and the appointment of a three-judge court should be denied, and defendant's motion to dismiss should be granted.

An appropriate Order is entered.

ORDER

AND NOW, this 2nd day of December, 1974, plaintiff's motion for a temporary restraining order and for appointment of a three-judge court is hereby denied. Defendant's motion to dismiss is hereby granted, and this proceeding is terminated.

s/ Wallace S. Gourley, SDJ.
Senior District Judge

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1092

WARREN A. McFADDEN,

Appellant

v.

G. H. McSHANE, INC., HONORABLE HENRY ELLENBOGEN, JOHN P. JOYCE, EUGENE L. COON and BERNHARD SCHAFFLER,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. No. 74-1090)

Argued June 25, 1975

Before VAN DUSEN, ROSENN and WEIS,
Circuit Judges.

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Attorneys for Appellee,
G. H. McShane Co., Inc.

OPINION OF THE COURT

(Filed Jul 14 1975)

PER CURIAM:

Plaintiff filed this suit in the district court to enjoin the continued enforcement of an attachment of his assets levied in accordance with the provisions of the Pennsylvania Rules of Civil Procedure 1251-1279 governing foreign attachments. A timely request was also made for the convocation of a statutory Three-Judge Court as authorized by 28 U.S.C. §§ 2281 and 2284. The district court denied the motion and dismissed the proceeding.

In Lebowitz v. Forbes Leasing & Finance Corp., 456 F.2d 979 (3d Cir.), cert. denied 409 U.S. 843 (1972), we reviewed the foreign attachment procedures in the light of Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), and Ownbey v. Morgan, 256 U.S. 94 (1921). Our conclusion was that, under existing precedent, the Pennsylvania rules were not constitutionally objectionable. Since that time, however, the Supreme Court has handed down a series of decisions including Fuentes v. Shevin, 407 U.S. 67 (1972); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974); and North Georgia Finishing, Inc. v. DiChem, Inc., 419 U.S. 601 (1975),[1/] where the issue was the application of due process concepts to various types of state seizure procedures.

We need not at this time decide whether these later cases in effect overrule Lebowitz. Rather, the question is whether a claim not constitutionally insubstantial is presented by the instant case. Goosby

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1/ The opinion in North Georgia Finishing, Inc. v. DiChem did not come down until after the district court had entered its order in the case sub judice. Hence, the district judge did not have the benefit of the most recent pronouncement of the Supreme Court on the subject.

v. Osser, 409 U.S. 512, 518 (1973). The more recent cases of the Supreme Court do indicate a continuing concern with the problem of prehearing attachments — sufficiently so, we believe, as to preclude a finding that the constitutional claim is insubstantial. Accordingly, we will remand the case so that the district court may utilize the procedures for the convocation of a Three-Judge Court.

Nothing in this opinion is to be construed in any way as passing on the merits of the constitutional question.

The order of the district court will be vacated and the case will be remanded for further proceedings consistent with this opinion.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 75-1092

WARREN A. McFADDEN,
Appellant

vs.

G. H. McSHANE, INC., HON. HENRY ELLENBOGEN, JOHN P. JOYCE, EUGENE L. COON, BERNHARD SCHAFFLER

(D.C. Civil Action No. 74-1090)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: VAN DUSEN, ROSENN and WEIS,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed December 2, 1974, be,

and the same is hereby vacated, and the cause is remanded to the said District Court for further proceedings consistent with the opinion of this Court.

Attest:

Clerk

July 14, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WARREN A. McFADDEN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action
	)	No. 74-1090
G. H. McSHANE, INC.,	)	
HONORABLE HENRY ELLENGOBEN,	)	
JOHN P. JOYCE, EUGENE L. COON and	)	
BERNHARD SCHAFFLER,	)	
	)	
Defendants.	)	

Before: ALDISERT, Circuit Judge, and GOURLEY and TEITELBAUM, District Judges.

OPINION OF THE COURT

PER CURIAM.

This three-judge court has been convened to test the constitutionality of Pennsylvania foreign attachment procedures, Rules 1241-1279, Pa. R. Civ. P. The defendants rely essentially on Lebowitz v. Forbes Leasing & Finance Corp., 456 F.2d 979 (3d Cir.), cert. denied, 409 U.S. 843 (1972).

For reasons set forth in Jonnet v. Dollar Savings Bank, ____F.2d ____ (3d Cir. No. 75-1529, Jan. 27, 1976), which concluded "that Lebowitz is no longer viable", we hold that the Pennsylvania foreign attachment procedures are unconstitutional.

The parties will submit a proposed order.

BY THE COURT,

Dated: February 2, 1976

s/ Ruggero J. Aldisert
Ruggero J. Aldisert,
Circuit Judge

s/ Wallace S. Gourley
Wallace S. Gourley,
District Judge

s/ Hubert I. Teitelbaum
Hubert I. Teitelbaum,
District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WARREN A. McFADDEN, Plaintiff,	)	
v.	)	**Civil Action No. 74-1090**
G. H. McSHANE CO., INC., HONORABLE HENRY ELLENBOGEN, JOHN P. JOYCE, EUGENE L. COON and BERNARD SCHAFFLER,	)	
Defendants.	)	

ORDER OF COURT

NOW, February 18th, 1976, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. That the Pennsylvania foreign attachment procedures, Pa. R.C.P. 1251-1279, are declared to be unconstitutional.

2. That defendants G. H. McShane Co., Inc. and Bernhard Schaffler be, and they hereby are, enjoined from further enforcing the writs of attachment served upon the garnishees in civil action No. 74-1046, entitled G. H. McShane Co., Inc., plaintiff, v.

Warren A. McFadden, defendant.

3. That the attachments made by said writs be, and they hereby are, set aside, suspended and dissolved.

4. That costs shall be borne by all parties.

5. That the operation of this order be, and it hereby is, stayed for the sixty-day period for appeal to the Supreme Court of the United States provided by section 2101(b) of Title 28 of the United States Code.

s/ Ruggiero J. Aldisert
United States Circuit Judge

s/ Wallace S. Gourley, SDJ
United States District Judge

s/ Hubert I. Teitelbaum
United States District Judge

Approved as to form:

s/ David L. McClenahan
Attorney for G. H. McShane Co.

s/ William C. O'Toole
Attorney for Honorable
Henry Ellenbogen

s/ James R. Fitzgerald
Attorney for John P. Joyce

s/ Norman P. Wolken
Attorney for Eugene L. Coon

PENNSYLVANIA RULES OF CIVIL PROCEDURE

RULE 1252
Scope

A foreign attachment may be issued to attach property of a defendant not exempt from execution upon any cause of action at law or in equity, other than an action ex delicto arising from acts committed outside the Commonwealth which is not required to be joined with an action of assumpsit under Rule 1020(d)(1), in which relief sought includes a judgment or decree for the payment of money when

(1) The defendant is an individual who is a nonresident of the Commonwealth, even though he is present in the Commonwealth;

RULE 1255
Commencement and Indexing

(a) The attachment shall be commenced by filing with the prothonotary a praecipe for a writ which shall direct the sheriff to attach such specific items of property of the defendant as are set forth in the praecipe and all other property of the defendant.

The praecipe shall state the amount of the plaintiff's claim.

(b) The prothonotary shall immediately enter the attachment against the defendant in the judgment index.

(c) If the sheriff attaches real property, legal title to which is held by the garnishee, the prothonotary on praecipe of the plaintiff, shall immediately enter the attachment against the garnishee in the judgment index.

RULE 1257
Service of Writ upon Garnishee or Person in Possession

The sheriff shall serve the writ in the same manner as a writ of summons in assumpsit upon the named garnishee and upon any person not named as garnishee who is found in possession of property of the defendant, and shall furnish the person served with an additional copy of the writ for each defendant. Adopted April 12, 1954. Eff. Oct. 1, 1954.

RU LE 1258

Attachment of Personal Property.
Disposition of Perishable Property

(a) Service of the writ upon the garnishee shall attach all personal property of the defendant in the possession of the garnishee at that time and, if any property of the defendant is in his possession at the time of service, shall also attach all personal property which shall come into his possession until judgment is entered against him.

(b) If no one is found in actual possession the sheriff shall attach the property by manual seizure.

(c) When perishable property is attached, the court may make such order relating to its preservation, sale or disposition as it shall deem proper. Adopted April 12, 1954. Eff. Oct. 1, 1954.

RU LE 1260

Attachment of Real Property.
Liens and Rents

(c) Service of the writ upon a tenant attaches rent due by him at that time and also all rent which shall thereafter become due by him until judgment is entered against him.

RU LE 1262

RU LE 1262. Bond not Required

No bond or security shall be required of the plaintiff by the sheriff, except for the actual or estimated cost of retaining possession of the attached property. Adopted April 12, 1954. Eff. Oct. 1, 1954.

RU LE 1272

Dissolution of Attachment.
Release of Property. Bond

(a) An attachment is not dissolved by service of the writ or complaint on the defendant nor by his appearance.

(b) An attachment is not dissolved by the death or dissolution of a defendant or garnishee.

(c) An attachment is dissolved when any person or party

(1) files with the prothonotary a bond, with security approved by the prothonotary, in double the amount of the plaintiff's claim or in such lesser amount as the court may direct, naming the Commonwealth of Pennsylvania as obligee, conditioned to pay the plaintiff, if final judgment is entered in his favor, the amount to which he is found entitled, including interest and costs, or

(2) deposits with the prothonotary, or with the sheriff for the prothonotary, to be held by him upon the same condition as the bond, security in the form of legal tender of the United States in an amount equal to the plaintiff's claim, including probable interest and costs.

(g) Specific property is released without dissolving the attachment when any person or party gives bond or security, as provided by Subdivision (c) of this rule, in an amount based upon the value of the property to be determined by the court, and conditioned to pay the plaintiff, if final judgment is entered in his favor, the amount to which he is found entitled or the value of the property released, whichever is less.

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U. S.
FILED
AUG 8 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-78

WARREN A. McFADDEN,
Petitioner,

v.

G. H. McSHANE CO., INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JUDD N. POFFINBERGER, JR.
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QUESTION PRESENTED

Should this Court grant review of a Court of Appeals decision which held that one who acts in good faith under a presumptively valid statutory procedure should not later be held liable in money damages under 42 U.S.C. §1983 when the procedure is overturned, where said decision is entirely consistent with the rulings of other federal courts, and where there is no valid public policy reason for changing the prevailing rule which disfavors the retroactive application of a change in the law?

STATEMENT OF THE CASE

In this matter Petitioner (defendant below) seeks to have this Court review the action of the United States Court of Appeals for the Third Circuit in affirming the dismissal of Petitioner's counterclaim by the United States District Court for the Western District of Pennsylvania. The Third Circuit's decision marked the conclusion of a long and complicated litigation between the parties.

This action was commenced by Respondent, a Pennsylvania corporation, on October 1, 1974, in the Court of Common Pleas of Allegheny County, Pennsylvania, by praecipe for writ of foreign attachment pursuant to Rule 1251, *et seq.*, of the Pennsylvania Rules of Civil Procedure. Three days later, within the time period permitted by Pennsylvania Rule of Civil Procedure 1265, Respondent filed its complaint in assumpsit against Petitioner, a citizen of the State of Florida. Copies of the writ of attachment and complaint were duly served on the garnishees during the month of October, 1974, and on Petitioner at his residence in Fort Lauderdale, Florida on or about October 25, 1974. Respondent's complaint claimed damages in the amount of $150,000 for breach of a contract for a real estate broker's

commission in connection with Petitioner's purchase of two parcels of real estate, one in Allegheny County and one in Butler County, Pennsylvania.

The right of a plaintiff to first secure a lien on a nonresident defendant's assets within the Commonwealth of Pennsylvania by a writ of foreign attachment, and then to judicially determine what if anything was due from defendant to plaintiff, existed and was frequently enforced in Pennsylvania for about 140 years. Act of June 13, 1836, P.L. 568, 12 P.S. 2861; *Liebermann v. Hoffman*, 2 Penny. 211 (1882). A writ of foreign attachment was an original writ which was used to commence an action against property, and not a person, and the res to be attached must have been within the jurisdiction of the court. ***Atkins v. Canadian SKF Co.***, 353 Pa. 312 (1946); ***Falk Co. v. American Railway Express Company***, 79 Pa. Super. 99 (1922). The purpose of a proceeding in foreign attachment was twofold: (1) to compel a nonresident to appear within the jurisdiction of the courts of Pennsylvania and defend plaintiff's claim, and (2) to secure a fund out of which plaintiff's claim against the nonresident, when reduced to judgment, could be paid. *Sniderman v. Nerone*, 136 Pa. Super. 381, affirmed on the opinion of the Superior Court, 336 Pa. 305 (1940); *Marano v. Granata*, 151 Pa. Super. 454 (1943). The requirements for a proceeding in foreign attachment were set forth in Rules 1251-1279 of the Pennsylvania Rules of Civil Procedure.

On October 30, 1974 Petitioner removed the action to the United States District Court for the Western District of Pennsylvania based upon diversity of citizenship. Several weeks later Petitioner filed a counterclaim which claimed damages in the aggregate amount of $4,000,000, allegedly resulting from the attachment of Petitioner's rental proceeds from the Smithfield Plaza Building in Pittsburgh, Pennsylvania, one of the two pieces of real estate upon which Respondent's claim for a real estate commission was based.

Petitioner's counterclaim acknowledged that he is a nonresident of Pennsylvania. The counterclaim did not allege that Respondent failed to comply fully with all of the procedural requirements of the Pennsylvania Rules of Civil Procedure in requesting that a writ of foreign attachment be issued by the Court of Common Pleas of Allegheny County and served upon the garnishees. The counterclaim also failed to allege that Respondent acted in bad faith or with an improper motive in attaching Petitioner's rentals. (63a). The sole legal basis for the counterclaim was the assertion, pursuant to 42 U.S.C. §1983, that the Pennsylvania foreign attachment procedures are violative of the Fourteenth Amendment of the Constitution of the United States, and that Respondent engaged in unconstitutional conduct by having made use of said procedures.

Respondent moved to dismiss the counterclaim on alternate grounds. The first ground for dismissal was that the Pennsylvania foreign attachment rules were not violative of the Fourteenth Amendment. Alternatively, Respondent's motion to dismiss asserted that even if the foreign attachment procedures should be held unconstitutional at some future date, Respondent could not be held liable for actions taken in good faith under color of existing law. By order dated January 31, 1975, the late Judge Wallace S. Gourley of the District Court dismissed Petitioner's counterclaim on the ground that the Pennsylvania foreign attachment procedures were not in violation of the Constitution of the United States. (3a).

In the meantime, Respondent having refused to dissolve the attachment, Petitioner McFadden filed a separate action in the District Court against Respondent McShane and others, at Civil Action No. 74-1090, requesting that a three-judge court be convened, that the Pennsylvania foreign attachment procedures be declared unconstitutional and that McShane's attachment be dissolved. The complaint at

Civil Action No. 74-1090 did not request an award of money damages. On December 2, 1974, Judge Gourley dismissed McFadden's complaint at Civil Action No. 74-1090, again holding that the Pennsylvania foreign attachment procedures were not unconstitutional. (65a). Indeed, Judge Gourley at that time ruled that, in view of the Third Circuit's decision in *Lebowitz v. Forbes Leasing and Finance Corp.*, 456 F.2d 979 (3d Cir. 1972), cert. den. 409 U.S. 843, reh. den. 409 U.S. 1049, and the then recent decision of Judge Rosenberg of the District Court in *Balter v. The Bato Company, Inc.*, 385 F.Supp. 420 (W.D. Pa. 1974), McFadden's complaint failed to raise a substantial constitutional question. (65a-66a). On appeal from the dismissal of his action at Civil Action No. 74-1090, the Third Circuit vacated Judge Gourley's order and remanded the case for hearing before a three-judge court. (69a). 519 F.2d 1398 (3d Cir. 1975). On January 27, 1976, in an unrelated case, the Third Circuit reversed the position which it had taken several years previously in *Lebowitz* and held that the Pennsylvania foreign attachment procedures are violative of the Fourteenth Amendment. *Jonnet v. Dollar Savings Bank of the City of New York*, 530 F.2d 1123 (3d Cir. 1976). Several days later (February 2, 1976), and based entirely upon the *Jonnet* decision, the three-judge court in the case at Civil Action No. 74-1090 found the Pennsylvania foreign attachment rules to be unconstitutional and enjoined the further attachment of McFadden's rents. (74a-79a).

On March 15, 1976, the Honorable Daniel J. Snyder of the District Court, having presided at a nonjury trial of Respondent McShane's claim against Petitioner McFadden, entered judgment against Respondent. In his Opinion Judge Snyder found that the disputed $150,000 commission had been earned by Respondent and that Petitioner had agreed to the payment of a commission in that amount; however, the Court found that the two parcels of real estate had not yet

yielded sufficient revenues to pay the $150,000 commission. Thus, Judge Snyder entered Judgment in the favor of Petitioner without prejudice to the right of Respondent to claim in another action that sufficient revenues exist to pay its claim (4a-33a).

On March 25, 1976, more than a year after the counterclaim had been dismissed, Petitioner filed a motion to vacate the dismissal of his counterclaim, based upon the fact that said dismissal was grounded upon authorities which had subsequently been overruled. The parties then filed a stipulation which provided that the District Court, in ruling upon Petitioner's said motion, could consider the broad question of whether, under any circumstance, the counterclaim states a claim upon which relief can be granted, rather than limit its consideration to the narrower question of whether the basis for Judge Gourley's earlier dismissal of the counterclaim was incorrect. In an Opinion and Order dated May 19, 1976, Judge Snyder denied Petitioner's motion to vacate the dismissal of his counterclaim. (34a-53a).

On appeal from Judge Snyder's decision the Third Circuit affirmed the dismissal of Petitioner's counterclaim by Opinion and Order dated April 26, 1977 (55a-64a). In its ruling the Court of Appeals followed its decision in the earlier case of *Kacher v. Pittsburgh National Bank*, 545 F.2d 842 (3d Cir. 1976), and held that a party is justified in relying upon the constitutionality of existing state procedures until such procedures are specifically overturned. (61a). The Court also held that its decision in *Jonnet v. Dollar Savings Bank of the City of New York, supra*, should not be applied retroactively so as to permit Petitioner to recover money damages from a potential creditor who acted under a presumptively constitutional statutory scheme. (62a).

The Petition for Writ of Certiorari followed.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEAL ON THE ISSUES DECIDED BY THE COURT BELOW

The essence of the Third Circuit's decision in this case is that one who relied in good faith upon existing state rules of civil procedure cannot later be held liable in damages when such procedures are overturned because, "[T]o do otherwise . . . would 'work an injustice on those. . .who acted in accordance with a time-honored and court-tested proceeding.' " (61a). This ruling is wholly consistent with the prevailing rule in the Third Circuit and in other federal courts throughout the United States.

Petitioner argues that all suits which happen to be pending at the time a change in the law occurs should automatically be given the benefit of a retroactive application of the change in law (Petition, 15-16) but this position has been expressly rejected by every court which has considered it. In ***Kacher v. Pittsburgh National Bank***, 545 F.2d 842 (3d Cir. 1976), plaintiff sought to recover money damages as a result of the defendant's unconstitutional use of the Pennsylvania replevin statute. Plaintiff's complaint, alleging that the Pennsylvania replevin procedures were violative of the Fourteenth Amendment, was filed before this Court's decision in ***Fuentes v. Shevin***, 407 U.S. 67 (1972), which found the Pennsylvania replevin statute to be unconstitutional. Also prior to ***Fuentes***, the complaint was dismissed by the district court. Following the ***Fuentes*** decision the Third Circuit summarily reversed the district court, based upon ***Fuentes***. The question in the district court at that time became whether ***Fuentes*** should be retroactively applied to award money damages in a case where plaintiff

had asserted the constitutional invalidity of the replevin statute before ***Fuentes*** was decided. Thus, if one substitutes the Third Circuit's ***Jonnet*** decision dealing with foreign attachment for the ***Fuentes*** decision, the foregoing recitation of facts is directly applicable to the present case. In ***Kacher*** the district court applied the standards set forth in ***Chevron Oil Co. v. Huson***, 404 U.S. 97 (1971), for determining whether the rule established in a given case should be applied retroactively, and ruled that the decision in ***Fuentes*** should not be retroactively applied in such a manner as to permit plaintiff to recover money damages because of the unfairness which would result to those who had acted in reliance upon a time-honored and then valid procedure. In affirming the district court's judgment the Third Circuit held that the defendant-creditor should not be penalized for having invoked a statutory procedure which had not at the time been held unconstitutional by any court. The Court of Appeals also held that, consistent with general principles of common law tort liability, plaintiff in a claim for damages under 42 U.S.C. §1983 must allege and establish that the defendant acted with a wrongful intent or for an improper purpose in seizing plaintiff's goods. Inasmuch as plaintiff in the ***Kacher*** case failed to make such allegations against defendant, the Court held that defendant could not be answerable in damages under Section 1983. Contrary to Petitioner's argument, there is no substantial distinction between the respective positions of the plaintiff in ***Kacher*** and the Petitioner in the present action. As a result, the Third Circuit found its decision in ***Kacher*** to be controlling when applied to the present case.

As indicated above, Petitioner relies upon 42 U.S.C. §1983 to support his counterclaim for money damages for use of an unconstitutional process. In the case of ***Rios v. Cessna Finance Corporation***, 488 F.2d 25 (10th Cir. 1973),

plaintiff attempted to recover damages for the pre-*Fuentes* seizure of its property pursuant to the New Mexico replevin statutes, which were subsequently held to be unconstitutional. Just as Petitioner in the present case counterclaimed for money damages pursuant to 42 U.S.C. §1983 prior to the *Jonnet* decision, plaintiff in *Rios* sought money damages under Section 1983 long before the Supreme Court's decision in *Fuentes*. Nevertheless, the Tenth Circuit affirmed the district court's grant of summary judgment for defendant, stating as follows:

> "A statute is presumed to be constitutional until struck down as unconstitutional. Cessna Finance followed the statutory procedure in bringing its replevin action. We therefore hold that §1983 is not applicable because damages are not collectible in a civil rights action against one who followed a statutory procedure presumed to be constitutional." 488 F.2d at 28.

In *Tucker v. Maher*, 497 F.2d 1309 (2d Cir. 1974), another Civil Rights Act case, plaintiff sought money damages for the allegedly unconstitutional attachment of his property pursuant to the Connecticut prejudgment attachment statutes. In affirming the lower court's dismissal of plaintiff's complaint the Second Circuit likened an action for money damages for use of an unconstitutional process under Section 1983 to a common law tort claim of malicious prosecution, and ruled that plaintiff must establish essentially the same elements as exist in that tort in order to succeed in an action under Section 1983. Among the necessary elements is the allegation and proof of an improper purpose or wrongful intent:

> "The common law tort of malicious use of civil process does require that plaintiff establish an improper motive on the part of the defendant. More precisely, the plaintiff must establish that the civil proceedings were initiated without probable cause and primarily for a purpose other than that of securing the adjudication of the claim on which the proceedings were based. Restatement of Torts [§677 (1938)]; W. Prosser, Law of Torts [§114 (3d ed. 1969)]."
>
> 497 F.2d at 1315.

As to the corporate and individual defendants who commenced the attachment proceedings, the Court in *Tucker* ruled that they "apparently acted on advice of counsel and no evil intent can be properly ascribed to them." 497 F.2d at 1315. As to the defendant attorney who had represented the corporate and individual defendants in the initial attachment proceedings, the Court held:

> "We think, as a majority of this court did in Fleming v. McEnany, [491 F.2d 1353 (2d Cir. 1974)], that counsel here had a right to rely on the statutory law of the jurisdiction which had not been repealed or replaced, or declared unconstitutional by any competent court at the time it was utilized. If counsel had failed to file the lien to protect his client, he might well be exposed to personal liability. *State legislation is under increasing constitutional attack but until the assault is successful, attorneys should be entitled to rely upon the presumption of constitutionality. Certainly their dependence upon a statute later found vulnerable is not to be equated with the malevolent intent basic to this particular tort. . .*"(Emphasis added).
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> 497 F.2d at 1315-1316.

In the present case the Pennsylvania foreign attachment procedures had not been held unconstitutional by any court at the time this action was commenced. To the contrary, the constitutional validity of said procedures had been expressly upheld by the district court less than one month before Petitioner's rentals were attached in this case, [*Balter v. The*

Bato Company, Inc., 385 F.Supp. 420 (W.D. Pa. 1974)], and again by the district court in dismissing Petitioner's counterclaim. (1a). Moreover, the counterclaim alleges only that Respondent used an unconstitutional process causing money damages to Petitioner. The counterclaim does not allege the element of improper motive or wrongful intent (63a), which the Second Circuit in *Tucker*, as well as the Third Circuit Court in *Kacher v. Pittsburgh National Bank*, *supra*, and *Howell v. Cataldi*, 464 F.2d 272 (3d. Cir. 1972), found to be essential for the establishment of a cause of action for money damages under Section 1983 for the use of an unconstitutional process. Even if Petitioner had alleged the requisite bad faith or malevolent intent in his counterclaim, it would be impossible as a matter of law for him to establish those elements, given the contemporaneous rulings in the district court which upheld the constitutionality of Pennsylvania's foreign attachment procedures.

In another case on point, *Chesney v. Adams*, 377 F. Supp. 887 (D. Conn. 1974), plaintiff in a civil rights action challenged the constitutionality of Connecticut statutes under which he was transferred, without prior hearing, from a state prison to a state mental hospital. Pursuant to 42 U.S.C. §1983 plaintiff sought declaratory relief, as well as money damages. The Court carefully examined the statute against existing precedent and determined that it clearly violated the Fourteenth Amendment. Notwithstanding that finding, the Court ruled:

> "Although the statute under which defendant committed plaintiff was constitutionally defective, plaintiff is not entitled to damages. Defendant was acting in good faith, pursuant to a law that had not then been declared invalid."
>
> 377 F.Supp. at 896.

The decision in the *Chesney* case is in complete accord with the prevailing rule that plaintiff in a civil rights action—

though he may be entitled to receive declaratory and injunctive relief against future harm, as Petitioner did here—is not entitled to recover money damages where the defendant acted in good faith and in reliance upon a statute which had not been found to be constitutionally defective at the time his actions were taken.

Still another civil rights case on point is *Slate v. McFetridge*, 484 F.2d 1169 (7th Cir. 1973), which dealt with the liability of Chicago city officials for failing to respond to a request for a permit for use of a city park for a political rally during the 1968 democratic national convention. In that case the Seventh Circuit stated:

> "It is a principle of elemental justice that a man not be held liable in damages for actions or omissions which he could not or should not be expected to have known would cause his liability. When he is a public servant, and when his acts are committed while he is arguably engaged in the pursuit of his official duties, strict liability becomes a proposition more weighty still, for good men may be deterred from the quest for public service by the imposition of such a burden. With these policies in mind, *federal courts have reached a general consensus that liability for damages under 42 U.S.C. §1983 must be determined by the legal standards in existence at the time of an alleged violation of constitutional rights*. Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed. 2d 288 (1967); Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973); Gaito v. Strauss, 249 F.Supp. 923, 934-935 (W.D. Pa.), aff'd on other grounds, 368 F.2d 787 (3d Cir. 1966); Bowens v. Knazze, 237 F.Supp. 826 (N.D. Ill. 1965); cf. Striker v. Pancher, 317 F.2d 780 (6th Cir. 1963).
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> • • •
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> "Retroactive application of fresh precedent has no place in fixing the standard of conduct for damage suits

under Section 1983." (Emphasis added). 484 F.2d at 1174.

See also Morales v. Hamilton, 391 F.Supp. 85 (D. Ariz. 1975); *Robinson v. Leahy*, 401 F.Supp. 1027, 1031 (N.D. Ill. 1975); *Knell v. Bensinger*, 380 F.Supp. 494 (N.D. Ill. 1974), *aff'd.* 522 F.2d 720 (7th Cir. 1975).

In *Hogopian v. Consolidated Equities Corp.*, 397 F. Supp. (N.D. Ga. 1975), the Court was presented with a civil rights claim for money damages based upon a prehearing seizure of property pursuant to a Georgia attachment statute of questionable constitutional validity. The Court dismissed plaintiff's claim, holding that, absent some improper motive, one acting pursuant to a statutory scheme assumed to be constitutional cannot be held liable for damages under 42 U.S.C. §1983 if the scheme is later held to be unconstitutional.

Petitioner has attempted to manufacture a conflict among the federal courts of appeal by citing the decisions of four three-judge courts, all within the United States Court of Appeals for the First Circuit,[1] and representing that the decision of the court below is contrary to those cases. Petitioner's reliance upon these four cases is misplaced because *none* of the said three-judge courts even considered the issue which was decided by the court below. Petitioner confuses the question of whether a given state procedure is unconstitutional with the question of whether, once that

[1]*Schneider v. Margossian*, 349 F. Supp. 741 (D. Mass. 1972).

Gunter v. Merchants Warren National Bank, 360 F. Supp. 1085 (D. Me. 1973).

Trapper Brown Construction Co., Inc. v. Electromech, Inc., 358 F. Supp. 105 (D.N.H. 1973).

McClellan v. Commercial Credit Corp., 350 F.Supp. 1013 (D.R.I. 1972), aff'd. mem. sub nom. *Georges v. McClellan*, 409 U.S. 1120 (1973).

procedure has been held unconstitutional, one who had previously made use of said procedure in reliance upon existing law should thereafter be subject to damages for use of an unconstitutional process. The First Circuit cases considered only the first issue; they did not consider the issue of whether their decision should be applied retroactively to other cases pending at the time of their decision so as to permit an award of money damages against one who acted pursuant to a then valid state procedure.

In *Schneider v. Margossian*, *supra*, plaintiffs did not even seek money damages. In *Gunter v. Merchants Warren National Bank*, *supra*, and *McClellan v. Commercial Credit Corp.*, *supra*, the courts enjoined further attachment of plaintiff's property (just as did the three-judge court in the present case), but did not discuss the matter of damages; rather, they remanded the issue of damages to the district court for finding and ruling. In considering the question of damages, the district courts would presumably be bound by the standards set forth in *Chevron Oil Co. v. Huson*, *supra*, *Linkletter v. Walker*, 381 U.S. 618 (1965), and other leading cases to determine whether retroactive application of the new rule of law would be appropriate insofar as damages are concerned. In the last of Petitioner's First Circuit cases, *Trapper Brown Construction Co., Inc. v. Electromech, Inc.*, *supra*, the plaintiff expressly waived any claim for damages, and so the three-judge court never considered the issue. Thus, the decision reached by the court below is in no way contrary to any of the cases relied upon by Petitioner. Counsel for respondent is not aware of a single federal court which has considered the issue which was before the court below and reached a different conclusion.

Petitioner argues that this Court's decision in *Fuentes v. Shevin*, *supra*, clearly foreshadowed an end to the Pennsylvania foreign attachment rules. While that issue is not now

before the Court, it may be useful to point out briefly that the remedy of foreign attachment to secure jurisdiction over a nonresident appeared to be very much alive in October, 1974, when this action was commenced.

The Pennsylvania foreign attachment rules operated in a fashion which was similar to the foreign attachment procedures of many other states, and said procedures had successfully withstood many attacks on constitutional grounds. In *Ownbey v. Morgan*, 256 U.S. 94 (1921), the Supreme Court affirmed the constitutionality of a Delaware foreign attachment procedure far more severe than the Pennsylvania rules. The creditor in *Ownbey* obtained a writ of foreign attachment by filing an affidavit with the prothonotary, without prior hearing or notice to the debtor. The Delaware statute which sanctioned this procedure also provided that the nonresident debtor could not even enter a general appearance and defend the action on its merits without first giving security in an amount sufficient to discharge the attachment. The defendant in *Ownbey* was unable to provide the necessary security and suffered a default judgment which was executed on the attached property. Unmoved by this result, this Court sustained the statute in the face of a broadside attack based on the due process, equal protection, and privileges and immunities clauses of the Fourteenth Amendment. The Court perceived nothing unconstitutional in a procedure far more burdensome to a nonresident debtor than the mere continuation of an attachment after a defendant's general appearance, an analogous feature of the Pennsylvania rules.

In *McKay v. McInnes*, 279 U.S. 820 (1921), the Supreme Court considered the constitutionality of a Maine statute which authorized prejudgment attachment without notice or hearing in any civil action, irrespective of the residency of the defendant. In a memorandum opinion, the Court upheld the statute on the authority of *Ownbey v. Morgan, supra*.

More recently, in *Lebowitz v. Forbes Leasing and Finance Corporation*, 456 F.2d 979 (3d Cir. 1972), cert. den. 409 U.S. 843, reh. den. 409 U.S. 1049, the Third Circuit thoroughly reviewed and upheld the constitutionality of all aspects of the Pennsylvania foreign attachment rules. The *Lebowitz* Opinion was handed down several months prior to *Fuentes*, although this Court twice denied certiorari in *Lebowitz* subsequent to *Fuentes*.

In *Fuentes*, which was decided June 12, 1972, this Court struck down the Florida and Pennsylvania replevin statutes as being violative of the Fourteenth Amendment. In so holding, the Court carefully distinguished the state's interest in maintaining replevin statutes from the quite different interests of the state in securing jurisdiction over the person of a nonresident defendant. The *Fuentes* decision expressly acknowledged that the need to obtain immediate jurisdiction over nonresident defendants in state courts was "clearly a most basic and important public interest," which justified the attachment of property without prior notice or hearing. 407 U.S. at 91-92. In support of this proposition the Court cited the case of *Ownbey v. Morgan, supra*. If the *Fuentes* case foreshadowed an automatic end to all prejudgment seizures of property, as argued by Petitioner, this Court would not have taken pains to state that there are indeed some situations in which the seizure of property without prior hearing or judgment is permissible, and that one such situation exists where an attachment is necessary to secure jurisdiction over a nonresident in a state court. Moreover, there would have been no point in expressly revitalizing the precedential value of *Ownbey v. Morgan*.

The next major case involving creditor's remedies was this Court's decision in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), handed down less than five months before the filing of Respondent's praecipe for writ of foreign attach-

ment in the present case. In *Mitchell* the Court upheld the validity of a Louisiana statute which permitted the sequestration of personal property on the *ex parte* application of a creditor, without notice to the debtor or opportunity for a hearing. In so holding, the Court pointed out that the attachment of property without prior hearing was both a lawful and common remedy, and again cited with approval the cases of *Ownbey v. Morgan* and *McKay v. McInnes, supra*. 416 U.S. at 611-614.

The decision in *Mitchell* was property recognized by several members of the Court as a substantial departure from the principles which were set forth in *Fuentes v. Shevin*.[2] In his dissenting opinion in *Mitchell*, Justice Stewart (who wrote the majority opinion in *Fuentes*) thoroughly compared the two cases, and concluded as follows:

> "In short, this case is constitutionally indistinguishable from Fuentes v. Shevin, and the Court today has simply rejected the reasoning of that case and adopted instead the analysis of the *Fuentes* dissent. In light of all that has been written in *Fuentes* and in this case, it seems pointless to prolong the debate. Suffice it to say that I would reverse the judgment before us because the Louisiana sequestration procedure fails to comport with the requirements of due process of law.

[2]The *Fuentes* case was decided by a four to three majority, with Justices Powell and Rhenquist not participating. The majority consisted of Justices Stewart, Douglas, Marshall and Brennan; the dissenters were Chief Justice Burger and Justices White and Blackmun. In *Mitchell* the line-up was completely reversed, with Justices Powell and Rhenquist joining a majority made up of Chief Justice Burger and Justices White and Blackmun. The dissenting Justices in *Mitchell* were the same members of the Court who had made up the majority in *Fuentes*, Justices Stewart, Douglas, Marshall and Brennan. This change in the makeup of the Court, coupled with both the majority and dissenting opinions in *Mitchell*, appeared to signal a significant withdrawal from the sweeping language in *Fuentes* regarding the standards to be applied to prehearing seizures of tangible personal property. *See, e.g., In the Matter of The Oronoka*, 393 F. Supp. 1311 (D. Me. 1975).

> "I would add, however, a word of concern. It seems to me that unless we respect the constitutional decisions of this Court, we can hardly expect that others will do so. *Cf. Roofing Wholesale Co. v. Palmer*, 108 Ariz. 508, 502 P2d 1327 (1972). A substantial departure from precedent can only be justified, I had thought, in the light of experience with the application of the rule to be abandoned or in the light of an altered historic environment. Yet the Court today has unmistakably over-ruled a considered decision of this Court that is barely two years old, without pointing to any change in either societal perceptions or basic constitutional understandings that might justify this total disregard of stare decisis."
>
> 416 U.S. at 634-5.

Hence, even if one were sufficiently prescient to conclude on the basis of *Fuentes* that all prejudgment liens on property were abrogated, the Court's unquestioned withdrawal from that broad view in *Mitchell v. W. T. Grant* made it appear that certain prejudgment liens or seizures-particulalry those where the state has a "most basic and important public interest" such as the securing of jurisdiction over nonresidents—continued to be valid.

Shortly after the *Mitchell* decision the constitutionality of the Pennsylvania foreign attachment rules was again challenged and upheld in an opinion by Judge Rosenberg of the United States District Court for the Western District of Pennsylvania in the case of *Balter v. The Bato Company, Inc.*, 385 F.Supp. 420 (W.D. Pa. 1974). Judge Rosenberg's opinion in that case was issued on September 6, 1974, less than a month before Respondent's praecipe for writ of attachment in the present case was filed. The Pennsylvania foreign attachment rules were once again found to be constitutional by the district court in Judge Gourley's opinion dated December 2, 1974, in the case captioned

McFadden v. G. H. McShane, Inc., at Civil Action No. 74-1090, which denied McFadden's request for the appointment of a statutory court and dismissed his Complaint.

The opinions of the district court below in *Balter v. The Bato Company, Inc., supra*, and *McFadden v. McShane, supra*, were both issued at or near the time when the present action was commenced. Unlike the First Circuit cases cited by Petitioner, Judges Rosenberg and Gourley considered the Pennsylvania foreign attachment procedures in the light of *both Fuentes* and *Mitchell*.[3] The Supreme Court's ruling in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), had not yet been issued at the time that the opinions of Judges Rosenberg and Gourley were handed down. Plaintiff submits that perhaps the most persuasive argument that *Fuentes* did not clearly foreshadow an end to the Pennsylvania foreign attachment procedures can be found in the simple fact that two members of the court to which this action was removed issued separate opinions which upheld the constitutionality of the foreign attachment rules in late 1974, at or about the same time that Respondent caused the attachment of Petitioner's rentals.

II. PETITIONER IS NOT ENTITLED TO RETROACTIVE APPLICATION OF THE *JONNET* DECISION TO SEEK AN AWARD OF MONEY DAMAGES MERELY BECAUSE HIS COUNTERCLAIM WAS PENDING AT THE TIME *JONNET* WAS DECIDED

Petitioner's second contention appears to have two branches. First, Petitioner argues that as the successful party

[3]A further significant distinction between the cases emanating from the First Circuit and the present one is that none of those cases deals with an attachment which has as its purpose the securing of jurisdiction over a nonresident defendant. The various New England state statutes under attack in those cases permitted the indiscriminate attachment of a defendant's property, regardless of whether he was a resident of the state.

in the case which changed the law, he has been denied "the fruits of his victory" by the court below. This argument ignores the fact that, as stated by the court below, "it is clear that the constitutional question regarding the foreign attachment provision was adjudicated by this Court in *Jonnet*." (61a-62a). Thus, Petitioner was not the successful party in the case which changed the law. Even if Petitioner had succeeded in changing the law of Pennsylvania, his entitlement to an award of money damages (as opposed to injunctive relief against further attachment of his rentals) would have depended upon the consideration of such elements as (1) whether the decision established a new principle of law by overruling part precedent on which litigants may have relied; (2) whether a retroactive award of money damages would further the operation of the new rule; and (3) whether a retroactive award of money damages would work an injustice or hardship upon those who may have relied upon prior law. *Chevron Oil Co. v. Huson, supra*.

Petitioner cites the case of *Simpson v. Union Oil Co.* 396 U.S. 13 (1969), an antitrust case in which a plaintiff whose business was injured was permitted to recover damages, in support of his argument that the decision of the three-judge court in the case at Civil Action No. 74-1090 entitles him to seek money damages through his counterclaim in the present case. Petitioner's reliance on this case is misplaced.

The right to recover damages in a private action for violation of the antitrust laws is mandated by Section Four of the Clayton Act.

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and *shall* recover threefold the

damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Emphasis added). 38 Stat. 731, 15 U.S.C. §15.

The primary purpose of the foregoing statute is to supply an ancillary force for the enforcement of the antitrust laws by giving individuals an incentive to sue when they are injured by antitrust violations. *Ames Co. v. Bostitch, Inc.* 240 F. Supp. 521 (S.D.N.Y. 1965). As stated by the Fifth Circuit in *Lehrman v. Gulf Oil Corporation*, 500 F.2d 659 (5th Cir. 1974), *rehearing denied* 503 F.2d 1403, *cert. denied* 420 U.S. 929 (1975):

> "Although the treble damage provision may be partially justifiable on compensatory grounds, its principal purpose is to deter antitrust violations. The prospect of a damage award multiplied three-fold should provide an incentive for private parties to instigate costly and uncertain litigation, thus supplementing Governmental enforcement." (Foot-notes omitted). 500 F.2d at 667.

If there were no assurance of a substantial recovery to a private antitrust plaintiff, *particularly* when the alleged violation appears at the time of filing suit to be doubtful or on the frontier of existing antitrust law, there would be a disincentive to proceed with such actions and the private enforcement purpose of Section Four of the Clayton Act would be thwarted. There is no analogous public interest or purpose in providing incentive for private citizens to bring actions (much less counterclaims) challenging the constitutionality of state rules of civil procedure, and therein lies one of the distinctions between the antitrust case cited by Petitioner and the present case. The ruling in *Simpson v. Union Oil Co., supra*, that plaintiff in that case was entitled to damages had nothing to do with a "rule" that the principle of nonretroactivity does not apply to the case in which a change in the law is first announced because plaintiff should

receive the fruits of his victory. Rather, this Court's holding in *Simpson* was simply an application of a statutorily mandated right to damages for a violation of the antitrust laws. The right of a successful plaintiff in an antitrust action to recover damages regardless of whether defendant may have relied upon earlier law constitutes an exception to the general principle that one will not be held liable in damages where he has justifiably relied upon previously existing law, where retroactive application of the new rule will not further its operation, and where retroactive application of the new rule will cause injustice. And the exception in antitrust cases is grounded upon the strong public policy which encourages private enforcement of the antitrust laws.

A further basis for distinguishing the *Simpson* case from the present one is that the Supreme Court's decision in *Simpson* did not establish a new principle of law, either overruling past precedent on which litigants may have relied, or by deciding an issue of first impression. In that case plaintiff operated a gasoline service station business as a retail dealer of defendant oil company. The Court found that the defendant's consignment contract, which called for a fixed price for the sale of gasoline to consumers, violated the Sherman Act. Defendant's position had been that its consignment contract was lawful under the Supreme Court's holding in *United States v. General Electric Co.*, 272 U.S. 476 (1926), wherein the Court upheld a similar consignment arrangement. The Court distinguished the *General Electric* case, however, on the basis that the consignment there had dealt with patented products, where the holder of the patent is entitled to extraordinary protection on the sale of his product during the term of the patent. No such protection was necessary or called for in the sale of gasoline. Because the Court did not overrule the *General Electric* case there was no new principle of law established in *Simpson*. Indeed,

the Court characterized its own ruling in *Simpson* as being "not innovative." 396 U.S. at 14. As a result, the rule against retroactive application of a new legal principle could not have been applied in that case in any event.

The case of *Stovall v. Denno*, 388 U.S. 293 (1967), cited by Petitioner, was not a civil rights action for damages. Rather, it was a federal habeas corpus proceeding whereby plaintiff sought to set aside his criminal conviction for first degree murder because he had been identified by an eye witness in the absence of his counsel, in a manner which the Supreme Court found unconstitutional in *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967). The Court held in *Stovall* that its rulings in the *Wade* and *Gilbert* cases requiring the exclusion of tainted identification evidence in a criminal trial would be applied prospectively only, with the result that petitioner Stovall could not benefit from them. The Court's reason for not applying the *Wade* and *Gilbert* rules retroactively was that to do so "would seriously disrupt the administration of our criminal laws." 388 U.S. at 300. The fact that the Court did give Wade and Gilbert the benefit of the rules established in their cases provides scarce support for Petitioner's contention in the present case because the considerations which exist concerning retroactive application of a newly established rule in a criminal action differ substantially from those which exist in determining how to apply a change in the law in the context of a Section 1983 action for money damages. In the criminal action, for example, there are no "defendants" who stand to be punished for having acted in good faith and in reliance upon laws which had not been declared unconstitutional. Moreover, in the criminal context, there need be no consideration of the question whether one who seeks money damages under Section 1983 can establish the requisite improper motive on the part of the defendant. In

short, the fact that Messrs. Wade and Gilbert benefitted from the new rules announced in their cases cannot fairly be cited for the proposition that a constitutional change in civil law gives rise to an action in money damages under Section 1983 to the party who succeeded in bringing about the change.

Petitioner also cites the cases of *Gray v. Creamer*, 465 F.2d 179 (3d Cir. 1972) and *United States ex rel. Tyrrell v. Speaker*, 471 F.2d 1197 (3d Cir. 1973) as support for his argument that the rule which favors only prospective application of a new principle of law does not apply to the case in which the new principle is announced. These cases do not support Petitioner's contention.

In *Gray* there is no mention of damages anywhere in the Court's opinion. Indeed, it appears that plaintiff in that case asked only for injunctive and declaratory relief, and did not request damages. 465 F.2d at 181.

In *Tyrrell* the Third Circuit reversed the district court's dismissal of plaintiff's complaint and remanded the case "with the direction to proceed to trial to determine whether or not Tyrrell's rights under the First, Eighth and Fourteenth Amendments have been violated. If they have, Tyrrell *may* be able to recover damages." (Emphasis added). 471 F.2d at 1204. There was no consideration in the *Tyrrell* opinion of the factors set forth to determine retroactivity in *Chevron Oil Co. v. Huson, supra*, or in *Linkletter v. Walker, supra*. It is submitted that the statement that plaintiff "may" be able to recover damages is hardly an indication that his entitlement to damages will be automatic in the event that liability is proved. Rather, upon a finding of liability, the district court would presumably be obliged to review the various factors in *Chevron*, *Linkletter* and *Kacher v. Pittsburgh National Bank, supra*, to determine if the ruling should be retroactively applied in order to award plaintiff damages, in addition to

the injunctive relief to which he would be entitled in any event.

Nor can the above-quoted remark in *Tyrrell* be properly cited as supportive of a general rule that damages will be permitted retroactively in the case where a new principle of law is announced, or in other cases which were filed but not decided before the new principle was announced — even in the civil rights area. In fact, the general rule in civil rights cases appears to be just the opposite. *See*, *Slate v. McFetridge*, *supra*; *Morales v. Hamilton*, *supra*; *Robinson v. Leahy*, *supra*; and *Knell v. Bensinger*, *supra*.

As indicated previously, the law in the Third Circuit regarding Pennsylvania's foreign attachment rules changed with the *Jonnet* decision. That decision made the statutory court's holding in Petitioner's other case at Civil Action No. 74-1090 automatic. Thus, Petitioner cannot fairly argue at this point that it was his case which succeeded in changing the law.

The second, or alternative, branch of Petitioner's second contention is that *all* cases which challenged the foreign attachment procedures which were still pending at the time of the *Jonnet* decision should be given the benefit of retroactive application of that rule, while at the same time conceding that plaintiffs whose cases are filed subsequent to *Jonnet*, even though based upon facts preceding *Jonnet*, would have no right to damages because of the nonretroactivity principle. (Petition, 15-16). As Petitioner puts it, "the decisive factor in determining whether a decision should have only prospective application should be the date when the other suits were filed." (*Id.*). Not surprisingly, Petitioner cites no cases which stand for the proposition that one's right to damages should depend upon whether his suit was filed the day before or the day after a new principle of law is announced. Doubtlessly, the paucity of case law stems from

the fact that the proposition is wholly illogical and arbitrary. In considering whether to apply a new rule of law retroactively a court must weigh such factors as whether retroactive application will further or retard the operation of the new rule, whether retroactive application will impose inequitable results or injustice, and whether defendant acted with an improper motive in making use of the prior law. None of these factors has any connection with the date on which the plaintiff's complaint happens to have been filed. There simply is no rationale for the arbitrary distinction drawn by Petitioner between cases filed before and after *Jonnet*, and Petitioner has offered none.

CONCLUSION

The federal courts have consistently held that one who, in good faith, acts under a time-honored statutory procedure presumed to be constitutional cannot later be held liable for damages under 42 U.S.C. §1983 when the procedure is overturned. There is no conflict among said courts regarding this principle. Moreover, there are no valid public policy reasons why the existing rule which favors only prospective application of a change in the law should be altered to permit automatically an award of windfall damages to persons whose cases may have been pending at the time the change is announced. For these reasons the order of the court below which affirms the dismissal of Petitioner's Counterclaim is a proper disposition of this case, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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